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General No. 10912

Agenda No. 23

IN THE  
APPELLATE COURT OF ILLINOIS

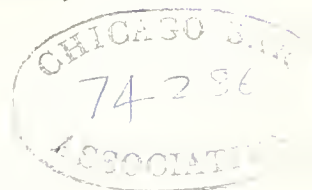
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SECOND DISTRICT  
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February Term, A. D. 1956

10 I.A.<sup>2d</sup> 63

VERNON H. ANDERSON,  
Plaintiff-Appellee,  
vs.  
BOARD OF EDUCATION OF SCHOOL  
DISTRICT NO. 70, WINNEBAGO  
COUNTY, ILLINOIS.  
Defendant-Appellant.

APPEAL FROM THE  
CIRCUIT COURT OF  
WINNEBAGO COUNTY,  
ILLINOIS.



DOVE, F. J.

By this appeal the Board of Education of School District No. 70, Winnebago County, Illinois seeks to reverse the judgment entered by the circuit court of Winnebago County in a proceeding instituted by Vernon H. Anderson under the Administrative Review Act (Ill. Rev. Stat. 1953, chap. 110, sects. 264 et seq.) The judgment of the circuit court reversed the order of said board of education which had discharged Anderson from his duties as a physical education teacher and coach.

The record discloses that on May 12, 1954, appellee, then finishing his second year as a teacher in Lincoln Park School, was employed by appellant for nine months, beginning in September, 1954, and was to receive for his services the sum

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of \$3360.00. His contract of employment required him to draw up, prior to the opening of school in the fall, in writing, a physical education program to be approved by the school superintendent and obligated him to teach such classes as were assigned to him by the superintendent, to meet at least once each six weeks with the teachers who teach their own physical education classes, outline a physical education program and to instruct those teachers how to teach the program.

During the summer of 1954, and until the middle of August, Anderson attended summer school and when his school opened on September 6, 1954, he was assigned by the superintendent, Ross W. Fairchild, to teach the fourth, fifth and sixth grade classes in physical education at Lincoln Park School, of which, Kent Robinson was principal. Anderson undertook to carry out this assignment and continued to teach until he was suspended by appellant on January 7, 1955, effective January 10, 1955.


Shortly prior to October 27, 1954, the superintendent requested Anderson to furnish weekly lesson plans for all of his classes on Friday of each week. This request was not complied with and on October 27, 1954, the superintendent again communicated with him. This was a written memorandum which read:

"Second Request.

"Subject: Lesson Plans.

"Please furnish us with weekly lesson plans for all your classes on Friday of each week as the other teachers do."

On November 17, 1954, the superintendent again wrote appellee as follows:



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"Subject: Physical Education Program.

"Mr. Robinson and I would like to talk with you in his office at 1:15 Friday in regard to the following points concerning the physical education program.

"1. Supervision.

- "A. Meeting once each six weeks with the teachers.
- "B. Supervising physical education classes on Monday from 1:00 to 2:30 and Wednesday 1:30 to 2:30 in the classroom or on the playground. Alternating between William Dennis and Lincoln Park School.

"2. P. E. Program.

- "A. Handing in your lesson plans each week.
- "B. Developing on paper and following a program for seventh and eighth grade boys. Deadline for program to be December 6.

"3. Discipline of classes.

- "A. Conducting them so that all children are participating.
- "B. Avoiding incidents where children are purposely struck by balls or handled physically."

In a conversation with Anderson about this matter on the Friday referred to in the notice at which Fairchild, Robinson and Anderson were present, Anderson was told that the deadline for handing in his written program was December 6th and Anderson said he would try and get it in by that time, but did not do so. Thereafter Robinson asked Anderson about it and Anderson replied, "I thought we were all going to get around a table and make out a program for the seventh and eighth grades."

The record discloses that this program was finally turned in by appellee on December 22, 1954. ~~xxxxxxxxxxxxxxxxxxxx~~  
~~xx~~ The record further shows that appellee met with the teachers of the school to outline the physical education program and instruct the teachers as to how to teach the program during the first



week of October, 1954, and it was about this time that the superintendent and principal both told appellee that they were dissatisfied with the discipline in the seventh and eighth grade boys' physical education classes and also with the program that was then being carried out. Thereafter appellee had some difficulties with his students which were called to the attention of Mr. Fairchild and Mr. Robinson and at a special meeting of appellant on January 7, 1955, appellee was suspended by the board and a week later he was dismissed as a teacher effective March 16, 1955.

At a special meeting of the board of education held on January 7, 1955, the board unanimously adopted a resolution suspending Anderson from all his duties as a teacher by reason of his mistreatment of pupils attending Lincoln Park School, said suspension effective January 10, 1955, at 8:00 o'clock A.M. A copy of this resolution was delivered to Anderson the following day.

On January 14, 1955, the board unanimously adopted a resolution which, after referring to the previous resolution of suspension, recited:

"WHEREAS, it further appears to said Board of Education that Vernon H. Anderson has failed to carry out and execute the physical education program as approved by the County Superintendent of Schools, Winnebago County, Illinois, as that program was submitted by Vernon H. Anderson to said Board of Education, and that Vernon H. Anderson has failed to cooperate with the Superintendent, Principal and other teachers in effecting an adequate personal supervision of the physical education program, and that Vernon H. Anderson has been guilty of physical abuse, or cruelty of pupils under his direct supervision and that Vernon H. Anderson ought to be dismissed from his position as a teacher for the best interests of the Schools of School District No. 70;

"BE IT THEREFORE RESOLVED that for the foregoing reasons in this Resolution contained, Vernon H.



Anderson be and he is hereby dismissed as teacher in Lincoln Park School, such dismissal to take effect on March 16, 1955."

Mr. Anderson was promptly notified of this action of the board and the reasons given Anderson for his dismissal were:

"1. Your failure to carry out and execute the physical education program, as approved by the County Superintendent of Schools, Winnebago County, Illinois, as the same was submitted by you to said Board.

"2. Your failure to cooperate with the Superintendent, Principal, and other teachers in effecting adequate personal supervision of the physical education program.

"3. Your physical abuse of pupils under your direct supervision.

"4. The determination of this Board of Education that such dismissal is for the best interests of the schools of said District."

On March 3, 1955, the record shows that the board had a further special meeting for the purpose of considering whether Anderson's discharge should be confirmed and after a full discussion and consideration of the matter, the previous resolution of dismissal was confirmed and the following day Anderson received the following letter from the secretary of the board:

"Dear Mr. Anderson:

"You are hereby notified that the board of education of School District No. 70, Winnebago County, Illinois on Thursday, March 3, 1955, unanimously confirmed its previous action in the form of a resolution to discharge you from your duties as a teacher within said school district effective March 16, 1955, in accordance with a notice heretofore served upon you and after hearing all of the evidence at the hearing, which was requested on your behalf, introduced both by the board of education and yourself.

"This notification is addressed to you pursuant to the terms and provisions of Article 24-3, chap.



122, Ill. Rev. Stat. 1953, and chap. 110, sec. 264 et seq. Ill. Rev. Stat. 1953 and represents the final decision of the board of education of School District No. 70."

Following the receipt of this notice the instant complaint was filed by Anderson on April 9, 1955, praying for a review of the record and that the decision of the board of education be reversed, that appellee be reinstated as a teacher and that he be paid all his salary as provided by his contract. Appellant answered denying that plaintiff was entitled to any relief and filed a transcript of the proceedings had before the board on March 2, 1955, as requested by the plaintiff in his complaint.

The record discloses that at this meeting of March 2, 1955, which was requested by appellee after he received his notice of dismissal, appellee was present and represented by counsel. All seven members of the board of education were present and all the witnesses who testified on behalf of appellee and on behalf of the board were sworn, their evidence taken in shorthand by a competent reporter and thereafter transcribed and filed herein as a part of the answer of appellant.

The School Code authorized appellant to dismiss appellee for incompetency, cruelty, negligence, immorality or other sufficient cause (Ill. Rev. Stat. 1953, chap. 122, art. 6, sec. 36) and also if in its opinion appellee was not qualified to teach or whenever in its opinion, subject, however, to the provisions of the Teacher Tenure Act, the interests of the school requires such dismissal (Ill. Rev. Stat. 1953, chap. 122, art. 7, sec. 16). The applicable provisions of the Teacher Tenure Act are to the effect that dismissal for any of the foregoing causes shall not become effective until approved



by a majority vote of all members of the board of education upon specific charges and after a hearing, if a hearing is requested in writing by the teacher.

The specific charges levelled by the board of education at appellee were three: (1) his failure to carry out the physical education program which he submitted to the board; (2) his failure to cooperate with the superintendent, principal and other teachers in effecting adequate personal supervision of the education program of the school; and (3) his physical abuse of pupils. It therefore devolves upon this court to review the record and determine whether the findings and decision of the administrative agency are supported by the evidence and whether the evidence sustains ~~the~~ the conclusion of the board that it was for the best interests of the district to dismiss appellee as a teacher. (Trico Community Unit School District v. County Board of School Trustees, 8 Ill. App. 2d, 494, 497)

The contract of employment executed by the parties hereto provided that Anderson should submit a physical education program prior to the opening of the school year. This was not done and it was not until December 22, 1954, that his program was submitted to the school authorities. Ross Fairchild, Superintendent of Schools testified that Anderson met with the teachers the first week of October in connection with outlining a physical education program; that each teacher was required to leave in the superintendent's office a copy of his lesson plan for all of his classes on Friday of each week; that Anderson did not do this; that prior to October 27, 1954, <sup>Fairchild</sup> ~~he~~ had requested him to do so, but he did not; that he sent him a second written request to do so on October 27,



1954, but Anderson did not comply with this second request; that from the time school opened until Anderson was dismissed fifteen of these weekly lesson plans were due, but Anderson had only handed in five. Mr. Fairchild further testified that on November 19, 1954, he and Mr. Robinson and Mr. Anderson met in Robinson's office at the school at which time Anderson was told that Fairchild and Robinson were dissatisfied with the discipline in the seventh and eighth grade boy's physical education classes and dissatisfied with the program that was being carried out and Anderson agreed to hand in a new program for these grades by December 6, 1954, but he did not do so; that in this conversation, Fairchild asked Anderson to avoid throwing any objects at the students and not to strike or use any physical force against any student except to shake him and Anderson agreed to do this. Fairchild further testified that the physical education program for the fourth, fifth and sixth grades as carried out by Anderson was inadequate and that Anderson did not follow the plans which he himself had submitted.

Kent Robinson testified that he was the principal of the Lincoln Park School and he corroborated the testimony of Mr. Fairchild and said that from the time school opened in the fall until Anderson was discharged he met with the teachers on only two occasions; that he was told that the principal and superintendent would like to have him meet with the teachers who taught their own education classes and Anderson said he would, but did not do so. This witness further testified that at a subsequent conference at which Mr. Fairchild was present an incident in connection with Anderson striking Gene Hubler, a boy in Anderson's classes,



was discussed. Robinson testified that Anderson said that the boys of this grade were lining up ready to go back to their classes; that Gene said he had a headache and was ill and was going to the nurse's office and took off without any permission from Anderson; that Anderson ran after him, grabbed him, brought him downstairs and pushed him into line. This incident will be hereafter referred to. Mr. Robinson further testified that he found Anderson to be "hesitantly co-operative as a teacher" and he thought Anderson's physical education training program in the fourth, fifth and sixth grades was adequate. Mr. Fairchild testified, however, that in his opinion, the program of Anderson for these grades was not adequate.

Gene Hubler testified on behalf of appellant to the effect that he was eleven years of age and attending the Lincoln Park School; that on one occasion he was playing soccer ball in the gymnasium; that he had a headache and asked Anderson if he could go to the school nurse; that Anderson told him to go and he started up the steps and Anderson "took me by the arm, drug me downstairs and then picked me up and threw me on the floor. My left side struck the floor. He did not call out my name before he came over to me. I set there until we went back to the room and then went up to the nurse."

Appellee's version of the Hubler incident is that the class was divided and were playing soccer ball and about six or seven minutes remained to play before the end of the period; that Gene told him he had a headache and Anderson replied, "So do I. You can go down there and stand in line for the rest of the period"; that Gene said, "I ain't going



to do it," and walked away a few steps; that Anderson then said, "Get in line where you belong." Gene continued to walk up the steps and Anderson said to him, "This is enough monkey business. You get in line where you belong." Gene replied, "Who is going to make me?" Anderson then testified: "I took him by the arm, walked him to the gymnasium, put both hands on his shoulders and pushed him in line. He stumbled back in the line two or three steps and fell on his seat and nothing was hurt but his dignity. I went over to him and told the rest of the children to stay away from him. After class was over, he lined up in the line, went upstairs and ate his lunch. I did not pick him up and throw him on the floor. Hubler has been a continual griper and complainer ever since I've known him."

Gail Aamodt, Velma Purl, Gary Lucas and Robert Walling, all pupils about Gene Hubler's age and in his class and who were present in the gymnasium at the time of this occurrence substantially corroborated Gene's testimony. They all testified that they saw Anderson "drag Gene down the steps," pick him up by both hands and throw him on the floor and when Gene struck the floor he cried. These witnesses further testified that when Gene was thrown to the floor, Anderson did not come over to talk to him nor did he pick him up.

Jack Smith, fourteen years of age, one of Anderson's pupils, testified he was struck on the top of his head by a football held by appellee. "Mr. Anderson didn't throw it at me. He came down with it on the top of my head. I was sitting on the stage and he leaned over and struck me with it."



George Pumphrey another pupil testified that he was fifteen years of age; that in November 1953 Anderson told him to behave and Pumphrey said he would and started to walk away and Anderson "grabbed me by the shoulder and flung me up against the stage. I struck the stage and was hurt. I went home and told my parents and they came up here to school."

Harry Williams, Barry Bishop and George Sessions, pupils in Anderson's classes, each testified to the treatment accorded them by Anderson, by being shaken, hit by balls in the hands of Anderson or struck by him with his hands.

Anderson did not deny that he had had trouble with these pupils. He testified that Walling was not a bad boy, but impish and outspoken and had caused a small amount of trouble as to discipline; that Gail Asmodt and Velma Purl frequently came in late to the gym period; that he recalled nothing about the Harry Williams incident and was surprised when Harry's father came to him and asked him why he had thrown a basketball at Harry; that the Barry Bishop incident happened at the end of the period, the whistle had blown three or four times, but Barry turned around to take another shot at the basket and Anderson threw a ball in his direction and it hit him directly in the back of the head; that Barry laughed at first and then cried, but wouldn't tell Anderson why he was crying. Appellee stated that he had no recollection of any difficulty with George Sessions; that George Pumphrey was belligerent, never wanted to have any part in the gym classes but chose to sit on the side and irritate people; that he was pushing or joking or smacking another boy upon the occasion referred to by Pumphrey and he was told by Anderson to stop, but he did the same thing again and "I



grabbed hold of him by the side of the shoulder and held him up against the stage while I talked to him. He didn't complain to me about being hurt and I didn't do it with excessive force."

Appellee further testified that he told Mr. Robinson that he didn't have time to draw up a physical education program, but that he would do so as soon as possible; that he did meet with the teachers on two occasions and explained to the several teachers the program and told them that if they had a problem they should come to him and talk it over and he would help them.

Floyd Tarbert testified on behalf of appellee that he was succeeded as principal of the Lincoln Park School by Robinson; that appellee taught under his supervision for one year and did a satisfactory job in physical education and was an excellent basketball coach and that Jack Smith, Robert Walling and Gene Hubler had all been to his office for disciplinary reasons when he was principal. Ann Waters and Maude Heath also testified on behalf of appellee to the effect that they were employed in the kitchen of the Lincoln Park School which adjoins the gymnasium; that they had observed Anderson with his classes and never saw him strike or mistreat any of the pupils. The school nurse, Vivian Versteynen, testified on behalf of appellee to the effect that Gene Hubler came to her crying/<sup>and emotionally upset</sup> upon the occasion referred to by the other witnesses and that she noticed him leaving the gym and appellee went to him and inquired where he was going and grabbed his arm and pushed him back upon the floor. Charles Covert testified that he was the custodian of the school, had passed through the gym when appellee was having his classes



in physical education and never observed any exhibition of cruelty on the part of appellee.

Robert Gene Bushaw testified on behalf of appellee that he worked with appellee in coaching; that he had never seen Anderson abuse any pupil to the extent of injuring him; that he did see appellee push George Pumphrey ~~xxkxkx~~ with both hands and as a result the middle of Pumphrey's back struck ~~xxxxxx~~ the stage. This witness further testified that the force used was not excessive but reasonable, but he, himself, didn't use the methods employed by appellee in his physical education classes and did not approve of what appellee did.

We have set forth a fair resume of the evidence found in this record. The conclusion is inescapable that appellee by his acts of commission and omission justified appellant in concluding that the best interests of the school district required the dismissal of appellee as a teacher. The board of education which employed him, after hearing and considering all the evidence, being familiar with existing conditions and being the tribunal vested with the power to retain or dismiss appellee as a teacher, unanimously concluded that appellee had failed to carry out the physical education program which he had submitted; that he had failed to co-operate with the superintendent, principal and other teachers in effecting adequate personal supervision of the education program and that his physical abuse of his pupils required his dismissal.

There is nothing in the record indicating that the board of education was prompted to do what it did by anything other than its duty and an earnest desire to bring about a

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wholesome, harmonious relationship between superintendent, principal, teachers, and pupils. Its duty was to provide schools operated in an efficient manner in accordance with approved educational standards and the provisions of the School Code and to exercise its discretionary powers in good faith.

Appellee's admitted failure to comply with the provision of his contract with reference to the submission by him of a physical education program prior to the opening of school in the fall; his admitted failure to meet with the other teachers; his exhibition of temper and emotion; his inadequate methods of teaching; his infliction of physical punishment upon his pupils contrary to the expressed instructions of his superintendent and principal were all matters which were brought to the attention of the board before the board took any action.

Appellee was notified of the action of the board, and at his request a public hearing, as provided by law, was had. He was represented by counsel of his own choice. He presented the testimony of any witness he desired. He was confronted by the witnesses who testified against him and he gave, in great detail, his version of the charges preferred against him. As to the infliction of physical punishment upon his pupils, he now insists that a teacher stands in the place of the parent and has a right to punish the child in a reasonable manner for infractions of discipline. That may be true, but in the instant case the board of education, which employed appellee, found, from the evidence, that he was guilty of physical cruelty toward his pupils;



that his conduct was such as to necessitate his dismissal; and that it was for the best interest of the schools of its district to discharge appellee. There is evidence in the record to sustain these findings.

The contract of employment entered into by the parties to this proceeding was authorized by the School Code, and the provision of that code became a part of its terms. The legislature may specify the conditions and reasons upon which a pre-existing contract of employment may be terminated (Pack v. Sporleder, 394 Ill. 130, 140), and it has wisely provided that the findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct, and it is only when the record shows the order of the administrative agency to be without substantial foundation that a court should set it aside. (Curtis v. State Police Merit Board, 349 Ill. App. 448; Community Unit School Dist. v. County Board of School Trustees, 9 Ill. App. 2d, 116,124, 132 N.E. 2d. 584,588.)

The circuit court erred in entering the order appealed from. The judgment order of the Circuit Court of Winnebago County is therefore reversed.

Judgment order reversed.

*Crow, J. Concurs.*  
*Covaldi, J. Concurs.*



No. 10895

Agenda No. 10

IN THE

10 I.A. 24 64

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1956

TRANSIT TRUCKING COMPANY,  
a corporation,

Appellant,

- VE -

CHARLES CAITICH,

Appellee.

Appeal from the  
Circuit Court of  
DuPage County.

EOVALDI, -- J.

This action was brought to recover damages occasioned by the negligence of the defendant in driving his automobile. The question of defendant's liability is not an issue on this appeal. The complaint consisted of two counts and sought damages of \$5,000.00 to a certain motor vehicle, a truck and tank trailer, sustained on March 18, 1953, being the amount of money plaintiff alleged it was required to lay out and expend in the repair of the said vehicle.

Prior to the plaintiff's resting its case, the court struck from the record the plaintiff's evidence of damage sustained to both the tractor and the trailer, and at the close of plaintiff's case, the defendant made a motion to direct a verdict on the ground that the plaintiff had not proven its damages and that there was no evidence in the record of damages sustained by the plaintiff. The court



granted such motion and entered a judgment in favor of the defendant from which this appeal is taken. The propriety of such ruling is the only question involved.

The plaintiff's theory is that the measure of damages sustained by it was properly and adequately proved so as to make a question of fact on that issue and that the trial court erred in directing a verdict in favor of the defendant.

Two witnesses testified for plaintiff. William Ralph Gordon, who was driving the oil tanker, semi, with a White tractor, testified as to the manner in which the tractor and trailer were involved in the accident. He identified two photographs, one of the tractor, the other of the semi-trailer, as portraying the condition of the truck and trailer immediately after the accident. The tractor and trailer were taken to the Schwerman Trucking, Milwaukee, which was the Transit Trucking at that time.

Plaintiff sought to prove its damages by the other witness, Edward LaMarre. This witness testified that he was purchasing agent for the Schwerman Trucking Company and his duties included all the purchasing, time study on mechanics and estimating accidents; anything pertaining to purchasing or buying or the spending of money. He testified that he had to check all jobs in reference to repair of vehicles, check the mechanics' time against what it ought to take, and the materials used in repairing the vehicle.

He testified that his prior experience was eleven years with the White Motor Company, Milwaukee branch, and that his duties the last three years at White were as Assistant Superintendent, checking mechanics' time against jobs



for accuracy and amount of time consumed; estimating repairs on accidents or regular customer repairs where they wanted an estimate before proceeding with the work. He identified plaintiff's exhibit 1 as their Unit 407 and testified that he saw the vehicle shortly after the accident; that the picture was taken in their backyard; that the unit was in the condition as portrayed in the picture as it was when they set about repairing it. He identified plaintiff's exhibit 2 as the tanker which was attached to the tractor and stated that it was in that condition when he began the inspection for repairs; that they were doing Transit's repairing at that time; that the whole front end of the tractor was collapsed; the radiator, hood, cowl, cab; the whole inside of the cab, steering gear, bumper, front axle, center beam, and the rear axle was out of line, and the frame was bent. He testified that he saw the tractor before the accident of March 18, 1953, and it was in good condition then; that it had no items of damage that appeared in the photograph; that on March 18, 1953, he was familiar with the reasonable cost of labor and materials for the repair of such tractor in Milwaukee, Wisconsin, and environs. The witness further testified that the cost of repairing the unit was \$2,351.77, and that this figure included what was called betterment items, and betterment items were those things that were repaired but were not directly due to the accident.

As to the trailer, which the evidence shows was not repaired, the witness testified that they were able to salvage \$500.00 for scrap; and that as the trailer was valued at \$3,000.00 before the accident, the net loss on the trailer



was \$2,500.00. As to the trailer, therefore, the witness was testifying as to values of this equipment, and not as to the cost of its repairs. It became apparent, shortly after cross-examination of this witness that he was not qualified to testify as to such values. He knew nothing about depreciation factors on trucks and only knew their cost from seeing figures in the accounting department. He had never bought a tractor or trailer. He had never sold a trailer. He did not know what the value of the trailer in this case would have been when new. The court struck the testimony concerning the trailer which had been given in direct examination.

The appellant contends that the defendant's motion to strike the testimony of the witness, LaFarrre, came too late; that the defendant, having failed to object to plaintiff's evidence in reference to damages, the trial court should have permitted such evidence to be considered by the jury and be given its natural and probative effect to determine plaintiff's damages. The motion to strike was made immediately upon the defendant developing, through cross-examination, that the witness was incompetent to give an opinion on that element of the case.

Occasions have arisen where the objectionable character of evidence would not immediately be apparent as the testimony was being given. It was only logical, therefore, for the courts to hold that a motion to strike, made at the time of the disclosures, came in apt time. In the early case of *Hulick v. Scovil*, 9 Ill. 159, the question arose with reference to testimony in an ejectment suit. At page 169, the court said:



"Nor will the court undertake so to control a party endeavoring to make out his chain of title, as to require that each link be the regular sequence of that next preceding it in the order of the evidence. When, however, the whole evidence on the subject has been heard, if the court consider it insufficient, they may, on the application of the party against whom it was offered, either exclude it, or instruct the jury that it is insufficient to maintain the action or defense as the case may be."

The case of *Kelleher v. Chicago City Ry. Co.*, 256 Ill. 454, was a personal injury action. During the course of the case, the testimony of the plaintiff with reference to the injuries to his wrist, was objected to by the defendant's counsel after it developed in the course of the trial that this testimony was not competent, and the court said, p. 458:

"The defendant moved to strike out this evidence in reference to the bone in the wrist, but the court denied the motion. It is insisted by the defendant in error that the motion was properly denied because the evidence was not objected to. The evidence was a link in the chain of evidence showing the plaintiff's damages. The testimony was given by the plaintiff while describing his injuries and subsequent disabilities, and its objectionable nature could not be known until after it was given. The motion to strike out the evidence was proper and should have been sustained. *Chicago Union Traction Co. v. Giese*, 229 Ill. 260; *Hagen v. Schleuter*, 236 Id. 467."

The principle above set forth has been carried forward in later cases, as shown in *Lehigh Stone Co. v. Industrial Com.*, 315 Ill. 431, at p. 436:

"At the close of Dr. Yeates' testimony plaintiff in error moved to exclude it on the ground that it was incompetent for the reason here stated. The record does not show that this motion was passed upon. Defendant in error contends that plaintiff in error was not entitled to a ruling excluding this evidence because the testimony was not objected to when given. The opinion of the doctor referred to was given on direct examination. The basis of that opinion was developed on cross-examination. It was therefore proper to move the exclusion of the opinion and the commission should have excluded it. His testimony was incompetent,



and we are of the opinion that the competent evidence in the record does not sustain the award of the commission for partial permanent disability."

The plaintiff, having offered no competent evidence as to its damages to the trailer, did not have an issue of fact to submit to the jury as to this phase of the case.

As to the tractor, the evidence of the witness LaMarre is as follows:

"Q. And what was the cost of the repair of that unit?

"A. \$2,351.77, I believe is the figure.

"Q. Now, doesn't that \$2,351.77 include what is called betterment items, Mr. LaMarre?

"A. That's right.

"Q. Will you tell the jury what betterment items are, please?

"A. When they have an accident of this type, when they get it all completely torn down there are things that aren't directly due to the accident or are not related to that that they will do to it, sooner than to put it all back together and have to do those repairs anyways. In other words, it's something over and above that wasn't directly caused by the accident.

"Q. Then those betterment items would serve to reduce this figure you have given us?

"A. Yes sir.

"Q. What would the net loss then be, Mr. LaMarre?

"A. \$2,000."

After the witness on cross-examination stated that he had not personally repaired any vehicles himself, the court, on motion, struck his testimony concerning the tractor.

A motion for directed verdict presents the single question whether there is in the record any evidence which, standing alone and taken with all its intendments most



favorable to the party resisting the motion, tends to prove the material elements of his case. *Seeds v. Chicago Transit Authority*, 409 Ill. 566; *Trennert v. Coe*, 4 Ill. App. 2d. 166. Considering the above evidence as to cost of repairs to the tractor in the light of the past experience of the witness LaMarre, we are of the opinion that the trial court erred in not submitting this evidence to the jury and in directing a verdict of not guilty.

Accordingly, the motion of the defendant for a directed verdict at the close of the plaintiff's evidence should not have been allowed, and the allowance thereof and the judgment for the defendant entered on the directed verdict is reversed and the cause remanded for a new trial.

Reversed and remanded.

*Howe P. J. Concur*

CROW, J. Concur

GROUP 1. Groups

MA. 12/16

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Abstract

General No. 10908

Agenda No. 20

IN THE  
APPELLATE COURT OF ILLINOIS

10 I.A. <sup>2.d</sup> 64

SECOND DISTRICT

February Term, A.D. 1956

G. A. RAPEL, d/b/a  
G. A. RAPEL and COMPANY,  
  
Plaintiff-Appellant,  
  
vs.  
  
THE CITY OF ELMHURST, a  
Municipal Corporation,  
and GEORGE LANGLER,  
  
Defendants-Appellees.

Appeal from the  
Circuit Court of  
DuPage County.

Dove, P. J.

G. A. Rafel, doing business as G. A. Rafel and Company, was engaged in the electrical business in the City of Chicago. He entered into a contract to do the wiring in five store buildings in the City of Elmhurst, Illinois. George Langler was the duly appointed Building Commissioner for the City of Elmhurst. Rafel had a permit, signed by Langler, to do this electrical work. When the work was nearly completed, Langler, acting in his capacity as Building Commissioner, stopped further work on the building and stated that it did not comply with the building code of the City of Elmhurst. Rafel took out the electrical installation and replaced it with heavier material.



He filed a suit in the Circuit Court of DuPage County to collect damages he ~~allegedly~~ <sup>allegedly</sup> sustained through the ~~unlawful~~ act of the City of Elmhurst and Langler, its Building Commissioner, in stopping the work and requiring him to put in heavier installation. The suit was tried before the court without a jury. At the conclusion of the evidence the court found the issues in favor of the defendants and entered judgment accordingly. It is from this judgment that the plaintiff has prosecuted an appeal to this court.

The complaint, among other things, alleged that the plaintiff was an electrical engineer; that he entered into a contract with named parties <sup>to do certain work</sup> according to the building code of the City of Elmhurst; that he had nearly completed the work when he was stopped by the police of Elmhurst and the Building Commissioner, George Langler; that Langler demanded that he remove the wiring and install and replace the same with wiring of a greater capacity; that at first he refused to comply with this request but later did so at an additional expense of \$1500.00, and by this proceeding, he seeks to recover from the defendants this sum together with \$3000.00 damages to his reputation and loss of profit on other contracts.

<sup>allegations of the</sup> The defendants filed their answer and admit part of the complaint but deny that there is any liability either on the part of the City of Elmhurst or on the part of George Langler, as they were both acting in their official capacity. They also deny that the plaintiff's wiring which he had at first put in complied with the building code of the City of Elmhurst. The



plaintiff does not allege in his complaint that the defendant acted wilfully or wantonly or maliciously in stopping the work and demanding that it be replaced with heavier material.

It ~~was~~<sup>is</sup> first insisted by the appellant that the City of Elmhurst is not excusable for responding in damages because the City was not acting in its governmental capacity but in a ministerial capacity in stopping the work. To support his contention he cites several cases, the first one being *The People, for the use of Cornelia A. Munson, v. Bartels*, 138 Ill. 322. In that case it was said that official action is judicial when it is the result of judgment or discretion and that a judicial officer will not be held liable for acts done by him in the exercise of his judicial functions if the act is within the scope of his jurisdiction. The facts in that case were that the Clerk of the Probate Court took an acknowledgment to a mortgage when he knew that the same was false, and the court in that case held the clerk liable, as performing a ministerial act instead of an official act.

Another case the appellant relies upon is *Gage v. Springer*, 211 Ill. 200. In that case it was alleged that the Board of Local Improvements approved some work that was done under special assessments, and the property owners sued the Board of Local Improvements and the contractor for damages. The declaration alleged that the Board of Local Improvements entered into a conspiracy with the contractor to have him install an inferior pavement. In reversing a judgment of the appellate court which affirmed the judgment of the circuit court which sustained a demurrer to the declaration which alleged that the



members of a board of local improvements and a contractor had entered into a conspiracy, as a result of which a pavement of inferior character was substituted for the one specified in the improvement ordinance, the court held that the members of the board of local improvements and the contractor were personally liable to the owners of the specially assessed property. Neither the Gage nor Munson case is in point nor anything said in either of those cases helpful in determining <sup>ing</sup> the question presented by this record.

It is stated in *Roumbos v. City of Chicago*, 332 Ill. 70 (p. 80): "A City, in the use of the police powers conferred upon it by the legislature does not act in its private capacity or in the local interest but in the exercise of a governmental function - a part of the political and governmental authority - of the state and in the general public interest, and it is therefore not liable for the acts of its officers in the enforcement of police regulations." Our Supreme and Appellate Courts have frequently held that a city acting in its governmental capacity is not liable for the negligent acts of its officers.

*(Culver v. City of Chicago, 130 Ill. 238; Taylor v. City of Chicago, 312 Ill. 124)*

It is claimed by the appellant that even though the City of Elmhurst was acting in its governmental capacity that George Langler, the Building Commissioner, was acting as a ministerial officer and should be held liable for the damage that he caused the appellant. He cites *La Cerra v. Woodrich*, 321 Ill. App. 107, to sustain his position. An examination of that case discloses the facts were entirely different from the facts in the case we are now considering. In that case the

members of a party of local inhabitants who a number of  
experts have a knowledge, as a result of which a number of  
friction cases have been submitted for the first time in  
the history of the country, the court has said that the  
the party of local inhabitants who the court has said that  
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holding the court has said that it is not the court's  
to show of local cases which is the result of the court's  
court of this court.

It is stated in the court's report of the court, that  
to (p. 10): "The court, in the case of the court's  
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defendant was a police officer and caused damage to the plaintiff's automobile while he was driving a police squad car. The complaint charged that the defendant police officer acted in a wilful and wanton manner. The evidence disclosed that the collision of the squad car and plaintiff's automobile occurred outside the jurisdiction of the police officer and disclosed that the defendant acted in a wilful and wanton manner and <sup>the Court</sup> held the policeman liable for the damage that he had caused the appellant. In the instant case the plaintiff does not charge that Langler acted in bad faith or wantonly or maliciously.

In the case of McCormick v. Bart, 95 Ill. 263, our Supreme Court in the course of its opinion stated (p.266): "It is not enough to aver the action of such officers (a board of school directors) was erroneous, but it must be averred and proved that such action was taken in bad faith, either wantonly or maliciously. If, in the discharge of their official duties, such officers simply err, it is what other tribunals invested with discretionary powers are liable to do."

In Lindemann v. City of Kenosha, 240 N.W. 373, the Supreme Court of Wisconsin has this to say: "Whether the issue or revocation of a building permit is a governmental function has not heretofore been specifically considered by this court. The courts of other states, under similar circumstances, have uniformly held that the exercise of the power to grant or revoke a building permit is a governmental function. (Citing cases) . . . Does the complaint state a cause of action against defendant Peterson, the building inspector? As to him the complaint alleges that, after examination and inspection of the

deliberate was a police officer and named George as the first-  
direct respondent who he was ordered to follow when he was  
compelled through force the defendant with other people in a  
vehicle and through various. The vehicle contained the  
collection of the group and the vehicle's destination was  
defined as the location of the police officer and the  
that the defendant was in a vehicle and was ordered to follow  
the defendant's order for the vehicle to go to the location  
specified. In the context of the defendant's order, the  
that the defendant was in a vehicle and was ordered to follow.  
To the end of the defendant's order, the vehicle was  
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plans and specifications submitted to him and to the zoning board of appeals, he duly issued to the plaintiff a building permit. The complaint further charges that he thereafter revoked the building permit without assigning any cause therefor. No allegation is contained in the complaint to the effect that defendant Peterson, as building inspector, had no authority to revoke a building permit without assigning cause for such action, nor that he acted corruptly, dishonestly, maliciously, or in bad faith. The law seems to be clear that an officer is not liable for the revocation of a building permit, unless it is shown that he acted corruptly, dishonestly, maliciously, or in bad faith in so doing. A public officer whose functions are judicial or quasi judicial cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous his judgment may be. *Roerig v. Houghton*, supra. 'A mere mistake in judgment, either as to their duties under the law or as to the facts submitted to them, ought not to subject such officers to an action. They may judge wrongly, and so may a court or other tribunal, but the party complaining can have no action when such officers act in good faith and in the line of what they think is honestly their duty.' *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163; *Stewart v. Southard*, 17 Ohio 402, 49 Am. Dec. 463."

The evidence in this case shows that before George Lengler ordered the work stopped on this particular building he consulted with two other members of the Building Commission, and they all agreed that the work installed by the plaintiff was not in conformity with the building code of the City of Elmhurst.



At the time Langler ordered the stoppage of this work he was acting in his official and governmental capacity. Having come to this conclusion it is not necessary for us to pass upon the other questions presented by this record. We have examined the evidence, however, and it discloses that appellant, when he installed the work in these particular buildings, did not do it according to the <sup>provisions of the</sup> building code of the City of Elmhurst.

The judgment of the Circuit Court of DuPage County should be and is hereby affirmed.

Judgment affirmed.

Corvalli J. Concurs  
Crow J. Concurs

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SOUTHERD DISTRICT OF NEW YORK

at the time he was arrested and was not  
acting in his official and government  
or was authorized to do so and was not  
other persons connected with the  
operation, however, and if the same were  
submitted the court is left with the  
it authorized to take the same as evidence.  
The court is of the opinion that the  
should be set aside and the writ  
granted.

Very respectfully,  
[Signature]

[Signature]  
[Signature]  
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Abstract

General No. 10923

Agenda No. 29

IN THE  
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

10 I.A.<sup>2d</sup> 65

February Term, A.D. 1956

T. W. MURRYMAN PLUMBING AND  
HEATING SERVICE, INC.

Plaintiff-Appellee,

vs.

GENE GOODMAN,

Defendant-Appellant.

APPEAL FROM THE  
CIRCUIT COURT OF  
LAKE COUNTY, ILLINOIS.

DOVE, J. J.

The plaintiff is a corporation engaged in the plumbing and heating business with its principal office in Chicago. On May 20, 1954, it entered into a written agreement with the defendant by the provisions of which the plaintiff agreed to do certain plumbing and heating work required in the construction of an addition to a school building in LaSage County.

On December 7, 1954, the instant complaint was filed to recover from the defendant, who was the general contractor for the construction of the addition to said school building, the sum of \$1909.63. The complaint alleged that plaintiff had furnished all the labor and material required under the subcontract and completed everything

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required of it on August 31, 1954. A copy of the contract was attached to and made a part of the complaint.

The defendant answered denying liability, alleging that the plaintiff did not fully perform the contract but had departed therefrom and that some of the work which was done thereunder was defective and had to be done over. At the time the answer was filed, the defendant also filed a counterclaim in which he alleged that on or about May 3, 1954, the parties entered into an oral agreement by the provisions of which the plaintiff was to do certain underground sewer work on the community Presbyterian church in Clarendon Hills, Illinois; that pursuant to said agreement the plaintiff undertook to do the work but did so without following the plans and specifications and made material and unauthorized variations in and omissions therefrom; that the building inspector condemned the work performed by the plaintiff, refused to approve it and as a result thereof, the defendant was required to have the work redone and corrected at a cost of \$1500.00 for which amount the counterclaimant prayed judgment.

On July 15, 1955, the defendant filed a second counterclaim in which he sought to recover \$1500.00, which he alleged was the cost and expense he had incurred in correcting plaintiff's defective work done under the plumbing and heating subcontract of May 20, 1954, for the addition to the school building.

Plaintiff replied to the counterclaims denying the allegations thereof and setting forth a release by the defendant as to the first counterclaim. The issues made by the pleadings were submitted to the court without a jury

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resulting in a judgment in favor of the plaintiff in the original complaint, for \$1909.63. The trial court denied the counterclaims and both were dismissed. To reverse these judgments, the defendant appeals.

A written contract was executed by the parties hereto under date of May 20, 1954. The contract price was \$5,000.00. Raymond Merryman, vice-president of the plaintiff work was commenced under the contract on May 25, 1954; that company testified that/he was on the job every day that work was done under this contract until it was completed on August 27, 1954; that, at the request of the defendant, work in addition to that specified in the contract was done which amounted to \$409.63. This extra work consisted of pumping out the excavation for which a charge of \$15.00 was made, installing concrete sump pump basins at a cost of \$344.18 and breaking concrete piers for which a charge of \$50.45 was made. The payments made by defendant to plaintiff aggregated ~~\$4500.00~~ \$4500.00 and were applied by it, first, towards the extras which it did and the balance applied on the principal contract. Payments were made to it as the work progressed, but when the job was completed there was a balance due it, according to the testimony, of \$1909.63.

The defendant testified that the plaintiff deviated from its contract in five respects. The first point of deviation claimed is that the contract required the main heating outlets from the furnace to be of two-inch pipe, whereas plaintiff substituted one and one-half inch pipe. As to this item, the plaintiff testified that one and one-half inch pipe was used because this was the size which was called for by the change made by the defendant in the original plans and specifications. The testimony was further that

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this change had been made by the engineers in charge of the job and that the defendant knew that this size pipe was being used, saw it frequently after it had been installed and at no time did he object to this departure from the original plans and specifications. The second deviation which defendant claims was made is that the original plans required two "Manifold Tees", whereas only one was used. Plaintiff's answer to this is that it was made as a result of a change in plans proposed by the engineers on the job and acquiesced in by defendant and made with his full knowledge. The third claimed deviation is that the plans called for a convactor radiator in the basement, whereas no radiator was installed in the basement. In defense of this, plaintiff calls our attention to the fact that the contract provides that one hallway radiator shall be omitted and that this basement hall radiator was the one that was omitted pursuant to this provision in this contract. The fourth deviation claimed by the defendant is that the contract calls for a certain type of sump pump to be used, one that was known as "Yeoman Brothers Co. #SD-3 Mod. "Y", vertical, single, submerged-type Super Drain, Bri-Sump Pump, having a capacity of 50 GPM." The evidence of plaintiff's witnesses is that the plaintiff installed a Yeoman Pump SDD-CH 19736 and that the pump which it installed is the same as that described in the contract covering this job. The last deviation claimed by defendant is that the steel base installed by the plaintiff on which the boiler was to rest was inadequate for the size of the boiler which was used, and the result was that the heat from the boiler caused the surrounding basement floor to crack. Plaintiff's explanation of this item is that there was no provision in the plans and specifications



or in its contract with defendant that plaintiff was to install the base for the boiler, and that, ordinarily, the contractor who does the cement work puts in the base for the boiler. The defendant did not dispute this latter assertion.

Two witnesses, T. W. Kerryman and Raymond Kerryman, testified for the plaintiff, and one witness, the defendant himself, testified on behalf of the defendant. It is unnecessary to further detail the evidence. The testimony offered on behalf of the defendant in several respects is in conflict with that of the plaintiff's witnesses. The trial court accepted the version of the transaction as detailed by plaintiff's witnesses. The court found that the plaintiff had in good faith performed its contract, and if there were any omissions they were so slight and unimportant as not to justify any deduction from the original contract price. We have read the record and agree with the conclusion reached by the trial court. There is substantial evidence in the record to support the allegations of plaintiff's complaint and under the authorities it was not necessary for plaintiff to prove a literal compliance with the provisions of the contract in order that it might recover in full from the defendant. (Concord Apt. House Co. v. W. D. O'Brien, 228 Ill. 360; Ruddy v. McDonald, 142 Ill. App. 111.)

As to defendant's counterclaim relative to the work which plaintiff was to do on the Presbyterian Church in Clarendon Hills, the evidence shows that a written contract was prepared by plaintiff in accordance with plans and specifications submitted by defendant and that this contract was executed by plaintiff. This instrument required certain



monthly payments to be made as the work progressed. Plaintiff commenced work on May 26, 1954, and continued until July 7 of the same year, when he refused to proceed unless defendant signed the contract for the job as he agreed to do. Defendant refused to sign and plaintiff pulled off of the job. After plaintiff left the job, the Building Trades Council arbitrated the dispute between plaintiff and defendant and as a result of their arbitration, plaintiff was paid by the defendant the sum of \$2406.88 for the work which it did on the church, and the evidence shows that plaintiff and the defendant executed an agreement releasing each other from further responsibility in connection with this job. The court found that the agreement which plaintiff and defendant executed pursuant to the settlement obtained by the Building Trades Council constituted an accord and satisfaction for all matters involved in the church controversy. It is our opinion that this was the only proper conclusion which the evidence warranted and which the court could have reached as to this counterclaim. Defendant's second counterclaim was based upon the costs and expenses which he alleged he incurred as a result of doing over the work on the school job made necessary because plaintiff allegedly deviated from his contract or failed to complete it. What we have said as to the issues made by the original complaint and answer applies to defendant's second counterclaim. The court was correct in denying recovery on it. The evidence sustains the findings and judgment of the trial court and that judgment will, therefore, be affirmed.

*J. Earl  
Crawford*  
*W. L. L. & Co.*

Judgment affirmed.

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Agenda No. 15

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1956.

101A.24 66

NICHOLAS ARENDT,  
Appellant  
vs.  
DONALD C. TALLMAN,  
Appellee.

Appeal from the  
Circuit Court of  
Kankakee County.

CROW, J.

The plaintiff, Nicholas Arendt, appeals from a judgment entered upon the verdict of a jury in favor of the defendant, Donald C. Tallman. The suit was brought for personal injuries arising out of a collision between the plaintiff's car and the defendant's truck. The sole error claimed by the plaintiff was the giving of certain instructions on behalf of the defendant and the refusal to grant the plaintiff's motion for new trial because of such.

The plaintiff's evidence was, in substance, to the effect that he was driving a car by himself, about 35-40 m.p.h., on Route 17, a two lane highway, 16 feet wide, about two miles from Momence, Illinois, in a southerly direction sometime after 7:00 p.m., September 26, 1952. His car collided with a truck driven by the defendant in a northerly direction at that time and place, and as a result the plaintiff's left arm was entirely disconnected from his body. It appears that at the point of the



occurrence the road bends slightly to the west and then slightly to the east, and there is a slight hill. Prior to the collision and at about 7:00 p.m. of that day, the plaintiff had had supper at the Dixie Highway Cafe, in or near Momence, and shortly thereafter he stopped at a nearby tavern, where he had two small bottles of beer. His left front car window was open at the time and a part of his left arm, particularly the elbow, protruded therefrom about two inches. The weather was mild. The plaintiff evidently had both hands on the steering wheel and was resting his left elbow on the window sill of the open left front window. The highway was rough, with holes in the pavement. As the plaintiff approached a rise in the slight hill, he saw a truck with a stock body, or grain box body, approaching from the opposite direction, and, when first seen, the truck was on the northbound side of the road. The plaintiff was, he said, at all times travelling on his right-hand, or southbound, side of the road. Just prior to the meeting of the vehicles the defendant's truck suddenly "lurched", the plaintiff says, onto the plaintiff's side of the highway, causing the left part of the defendant's truck to collide with the plaintiff's automobile near its left door handle at the rear of the car, breaking the glass in the rear windows of the plaintiff's car. He did not have time, he says, to withdraw his left arm before the impact. He did not feel any blow to his arm at the time of the occurrence. The lights were lit on both vehicles. The plaintiff's car was about 6 feet wide. Immediately prior to the collision the approaching cars were about one foot or so apart. After the collision the plaintiff drove his car some 300 feet down the highway, stopped, and was eventually given some assistance. In addition to losing his left arm, he had a large claim for hospital bills, medical services and loss of time.



The defendant's evidence was, in substance, that the body of his truck was 3 inches narrower than a standard body, making it about 7 feet 8 inches wide; he was going 20-25 m.p.h.; he saw the lights of the plaintiff's approaching car; the defendant says he was at all times in his own, northbound lane of travel; he says that as the plaintiff's car came down the slight hill it gradually came over onto the defendant's side of the road and was somewhat east of the center line; there was some evidence of tire marks tending to indicate the defendant's truck was on the defendant's side of the road. The defendant's truck was loaded with beans, the weight being about 6 tons. One right rear tire of defendant's truck, he says, was off the east edge of the pavement prior to and at the time of the impact.

The plaintiff and the defendant were the only witnesses to the occurrence. Under the circumstances, there being some conflict in the evidence, and the questions as to alleged negligence and alleged contributory negligence being close, it is particularly important and essential that the instructions be accurate and not have a tendency to mislead the jury:

SCHOONVELD v. KANKAKEE MOTOR COACH CO. et al. (1951) 343 Ill. App. 529, Second Dist.; ANDERSON v. MIDDLETON etc. (1953) 350 Ill. App. 59, Third Dist.; PARKIN v. RIGDON (1954) 1 Ill. App. (2) 586, Third Dist.; PETERS v. MADIGAN (1931) 262 Ill. App. 417, Second Dist.; SHARP v. BROWN (1953) 349 Ill. App. 269, Third Dist.

In the motion for new trial by the plaintiff, the alleged errors therein recited, so far as now material, concern only instructions given on behalf of the defendant, and were stated as follows: (1) giving an instruction "regarding the extension



of plaintiff's left arm outside of plaintiff's motor vehicle, which instruction was not supported by the evidence and provided the jury with a prejudicial statement implying the existence of facts not supported by the evidence"; (2) giving an instruction "as to their findings, if the evidence was evenly balanced, and further implying that if the jury were in doubt as to what they should do, they might find for the defendant". There are only two defendant's instructions referred to in the motion and though they are not therein referred to by number, we believe the instructions complained of are defendant's instructions Nos. 12 and 15.

Defendant's instruction No. 12 was:

"The Court instructs the jury that the plaintiff is required by Law to prove his case by a preponderance of the evidence before he can recover. If the plaintiff in this suit has not so proved his case or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance of the evidence, or if the preponderance of the evidence is in favor of the defendant, then in either of these cases the verdict should be not guilty."

Defendant's instruction No. 15 was:

"The Court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff extended a portion of his left arm outside of his motor vehicle immediately before and at the time of the accident complained of, and if you further believe from a preponderance of the evidence that the plaintiff in so doing was guilty of negligence which proximately contributed to the injury complained of, then under the law the Plaintiff cannot recover."

The plaintiff has made no argument here with respect to Instruction No. 12, or as to why it is erroneous, and, accordingly, we will not further consider it.

As to Instruction No. 15, however, we believe it was, under the circumstances, erroneous, prejudicial, and reversible error.



The undisputed evidence is to the effect that the plaintiff's car and the defendant's truck actually collided, the plaintiff's car being struck near its back door handle, shattering the glass in the rear windows. It is true that the plaintiff's left elbow was at that time extended about two inches outside the open left front window of the car, resting on the window sill, while his hands held the steering wheel, and, as a result of the collision, the plaintiff's left arm was torn off, but, under the circumstances here in evidence, this slight extension in that manner of a part of the plaintiff's left arm was not the proximate cause of the injury, even if it was contributory negligence. It is not clear from the evidence whether the defendant's car actually struck that slightly protruding part of the plaintiff's arm or not, or simply hit the plaintiff's car and the injury ensued therefrom. There is no positive evidence, in any event, that the defendant's truck did actually strike that part of the arm, or that the arm became caught or entangled in any part of the defendant's truck. Contributory negligence that will bar a recovery must be the proximate cause of the injury: WILLIAMS v. STEARNS (1930) 256 Ill. App. 425, Fourth Dist.; HESTAND et al. v. CLARK (1952) 345 Ill. App. 480, Fourth Dist.; GRAHAM v. HAGMANN (1915) 270 Ill. 252; LERETTE v. DIRECTOR GENERAL etc. et al. (1923) 306 Ill. 348; MILLER v. BURCH (1929) 254 Ill. App. 387, Second Dist.; PAGENKAMP v. DEVILLEZ (1935) 80 F (2) 485, C.C.A. 7th; JOHNSON v. RY. EXPRESS AGENCY, INC. (1942) 131 F (2) 1009, C.C.A. 7th; HUMPHILL, Ill. Jury Inst., Vol. 2, p. 297, 298.

The defendant cites principally the case of WARREN v. PATTON, (1954) 2 Ill. App. (2d) 173, Fourth Dist., urging that it is strikingly similar. We do not find it so. In that case the plaintiff's left elbow was protruding slightly outside his car window, resting on the window sill, and it was caught by and became en-

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tangled in some portion of the harness or equipment on the defendant's horsedrawn wagon when they met while proceeding in opposite directions, and the plaintiff's arm was thereby twisted about his neck. The Court there held that, under the circumstances, the question of contributory negligence of the plaintiff with respect to his having a part of his arm outside the car was a jury question. In that case the plaintiff's car did not actually collide with any portion of the defendant's wagon. The extended arm itself had in some manner become caught or entangled in some of the defendant's harness or equipment, from which circumstances the Court apparently felt a jury might reasonably conclude that, under the circumstances, the extension of the arm, if it were contributory negligence, did, in fact, proximately contribute to the injury. Such are clearly not the facts of the case at bar and we do not believe the case applicable here. Furthermore, no instruction similar to the present defendant's instruction No. 15 was offered or given in that case. It may be further observed that the Court there held the plaintiff was not, as a matter of law, guilty of contributory negligence because he was riding with his arm on the window ledge.

Again, in RUDOLPH v. CITY OF CHICAGO (1954) 2 Ill. App. (2) 370, First Dist., another instance of two vehicles meeting while proceeding in opposite directions, and in which, among other facts, the plaintiff had a part of his left arm resting on the ledge of the open window of his car, and suffered injuries thereto, the Court, among other things, held the plaintiff was not, as a matter of law, guilty of contributory negligence but that such was properly a question for the jury, when properly instructed, - and, again, no instruction similar to the present defendant's instruction No. 15 was offered or given.



The ultimate question, generally, of whether the plaintiff here was or was not guilty of contributory negligence proximately contributing to the injuries he suffered, was a proper question for the jury, as it normally is, under proper instructions. And there were some other instructions here, not presently involved, dealing with that general question. The particular facts and circumstances as to his left elbow being slightly extended, as indicated, from the open window of the car were one of several sets of facts and circumstances proper to be argued to and considered by the jury as possibly bearing on the ultimate general question of contributory negligence, or the lack thereof. But defendant's instruction No. 15 improperly singled out and placed undue emphasis on and gave undue prominence to that one fact or circumstance as to the extension of his arm, to the exclusion of the other facts and circumstances in evidence, all of which had to be considered. An instruction should not call attention to particular facts; selecting a part of the evidence and calling the jury's attention to it, omitting other evidence that is entitled to be considered on the same question is calculated to mislead the jury; an instruction should not single out or call attention to the testimony of any particular witness: HEMPHILL, Ill. Jury Inst., Vol. 1, p. 41, 43, 45. And the instruction is inapplicable to and inappropriate to the particular facts and circumstances here in evidence because the slight extension of the plaintiff's left arm here concerned, if it were to be considered contributory negligence in and of itself, which is, we think, highly doubtful, was not, under these facts, the proximate cause of the injury which ensued.

The judgment will, accordingly, be reversed and the cause remanded for a new trial.

*Howe P.J., Conover,  
Ewald J., Conover*

REVERSED and REMANDED.

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JUL 3 1955  
JULIUS R. RICHARDSON  
Clerk, Supreme Court  
Appellate Court

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IN THE

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APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1956

CECIL WOOD, d/b/a WOOD ELECTRIC  
COMPANY,

Appellee,

Vs.

WARD VANDERPOOL and LEE M.  
VANDERPOOL,

Appellants.

Appeal from the  
Circuit Court of  
Winnebago County.

ROVALDI -- J.

In the summer of 1951, the defendants, Ward Vanderpool and Lee M. Vanderpool, husband and wife, were planning the construction of a substantial home in Rockford, Illinois. The architect employed by them prepared a set of plans and specifications for the electrical work involved in the construction of the house and submitted the same to Cecil Wood, the plaintiff, who is an electrical contractor in Rockford, and who had performed work for the defendant, Ward Vanderpool, on previous occasions. On August 18, 1951, the plaintiff submitted a bid for the electrical work on the home, pursuant to said plans and specifications, for \$1889.00.

Actual construction on the house did not start until

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October, 1952. Before the work was started various changes were made in the work to be performed as set out by the original blue-prints and specifications, and such changes were incorporated in the work installed by the plaintiff.

The plaintiff filed complaint, in seven counts, based on an oral contract, for failure and refusal of defendants to pay the bill rendered to them after the completion of the work. The case was tried without a jury and the trial court permitted a recovery for a balance of \$6387.88. The defendants have filed this appeal.

The plaintiff's theory is that the work was performed on a time and material basis under an oral contract and that his bid of \$1889.00 was not binding by reason of all the changes made in the specifications, and because of extra work performed when the defendants changed their minds about the location and type of various fixtures and switches used.

The defendants' position is that the work was performed under a contract based on plaintiff's bid; that plaintiff was contacted following the receipt of the bid; certain changes in the work to be performed were discussed, and defendant wrote a letter, Defendants' Exhibit 4, dated September 9, 1952, incorporating the changes in work to be performed, and that the letter was delivered to the plaintiff together with the blue-prints and specifications prior to the time plaintiff's employees began work, and that plaintiff accepted the job on the basis of his original bid plus the additional amounts enumerated in the letter to be paid the plaintiff for the installation of extras itemised in the letter. The plaintiff denies having



received the letter, and contends that all the changes were made either orally or on the blueprints and that no discussion or agreement was ever made as to the amount to be paid for the extra work and materials required by the changes and additions to the work. All of the work to be performed as provided in the blueprints and specifications, and as changed either orally or by the disputed letter, has in fact been performed. The testimony is in conflict as to the basis under which such work was performed and the labor and materials furnished.

It is obvious that the trial judge was of the opinion that there was no contract fixing the amount due the plaintiff at a certain sum, but that plaintiff's recovery should be based on quantum meruit. The conflicting evidence surrounding the letter allegedly written by the defendant, which it is urged was a part of an existing contract between the parties, was resolved in favor of the plaintiff. The point of issue in this appeal then is whether or not the plaintiff, in the trial court, sustained the burden of proof required by law under quantum meruit.

The plaintiff's evidence consisted of his own testimony and that of three of his employees who worked on the job and two employees of the electrical supply company where most of the fixtures and supplies were purchased. He introduced into evidence the tickets for materials delivered and installed with the prices charged for same by the supplier and the time cards turned in by the men working on the job and he testified that he paid the men on the basis of the tickets turned in. The time cards merely showed the employee's name, the hours out



in and the general nature of the work done. The plaintiff testified that the prices charged for the materials were the fair, reasonable and customary charges for same. However, when it came to proving the time charges, plaintiff testified that he charged \$4.30 per hour for each man, which included \$3.00 which he paid as wages, the remainder being made up by a charge for social security, unemployment compensation, insurance, overhead and profit. There is a complete failure on the part of the plaintiff to prove that a charge of \$4.30 per hour for his men was the fair, reasonable and customary charge prevailing at the time or place such services were performed, or that the total amount charged for labor of \$4090.00 was a fair, reasonable and customary charge for all labor performed on the premises. The plaintiff in his testimony stated, "I charged \$4.30 per hour for each man who is employed as an electrician." This mere statement of a charge made falls far short of proving the fair, reasonable and customary price, or value of the work in the place where it was performed. In the case of Smith v. Snow, 71 Ill. App. 645, this Court, in an action in assumpsit to recover for printing done for defendant, said, page 646:

"The burden of proof rested upon the appellees to establish, by a preponderance of the evidence, every essential and material fact necessary to support the verdict as returned, in all its elements, including the amount of damages. This would require the appellees, by the same degree of proof, to show the fair, reasonable and customary price or value of the printing, for which they seek to recover, in the place where the work was performed. No evidence of such value appears in the record. The plaintiff, Collins, while a witness in the case, was asked by his counsel, a proper question to elicit such evidence, but for some reason, not disclosed by the



record, no direct answer was given to the question, the witness simply stating, 'we charge ten cents a line, and in this place the common price is ten cents a line.' This we think falls far short of proving the fair, reasonable and customary price, or value of the work in the place where it was performed, and we are therefore of the opinion the verdict is not supported by the evidence and the court erred in overruling the ~~motion~~ for a new trial."

To the same effect is *Stewart v. Board of Supervisors, Clark County*, 335 Ill. App. 385.

In discussing the function of a reviewing court with regard to burden of proof, our Supreme Court in *Bloom v. Yehon Co.*, 341 Ill. 200, 204, said:

"While under the law we are precluded from examining and weighing the evidence to determine where the preponderance of evidence lies or how the case should have been decided on the evidence, yet it is our duty, on a record like the present, to examine the evidence for the purpose of determining whether, when all the evidence is considered, together with all the reasonable inferences to be drawn therefrom, in its aspects most favorable to plaintiff, there is a total failure to prove any one or more of the elements necessary to be proven to maintain the cause of action alleged in plaintiff's statement of claim as amplified by his bill of particulars; (citing cases)."

From a careful reading of all of the evidence, it is apparent that plaintiff failed to establish by a preponderance of the evidence every essential and material fact necessary to support a judgment under quantum meruit. He failed to prove that the charge he made for electrical services and labor in the place where the work was performed was the fair, reasonable and customary price for said work. Therefore, we must hold that the trial court erred in entering judgment for plaintiff.

The judgment of the trial court is reversed and the cause is remanded for a new trial.

*Dave P. J. Conners*  
*for court*

Reversed and Remanded.

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Agenda No. 3

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In the first part of September, 1954, the State's Attorney of Bureau County filed an information in the County Court of said county charging Claude Bailey with unlawfully operating a motor vehicle while under the influence of intoxicating liquor. The defendant entered a plea of not guilty and was released on a cash bond of five hundred dollars. The case was set for hearing for November 17, 1954. At that time the defendant filed a motion for a continuance, stating that he had employed the Honorable Josef T. Skinner to represent him in the case and had paid him for his services; that the said Josef T. Skinner was then confined in a hospital at Rochester, Minnesota, and could not be present to represent him. The case was continued to December 20, 1954.



On December 20, 1954, the defendant again filed a motion for a continuance, supported by his own affidavit and the affidavits of the Honorable Josef T. Skinner and Paul D. Perona.

The affidavit of Mr. Skinner stated that he had been confined in the hospital and that he had undergone a surgical operation and was unable to appear in court to represent the defendant; that his physician had advised him not to do any work for at least thirty days.

The affidavit of defendant stated that he had a good defense to the charge and if properly represented by experienced counsel, who had time to prepare his defense, he would be acquitted; that the Christmas season was approaching, and the Honorable Josef T. Skinner, on account of his illness, was not able to defend him; that Mr. Skinner advised him on December 17, 1954, that he could not represent him; that the defendant that day employed Attorney Paul D. Perona to represent him; that the State's Attorney proposed to call a large number of witnesses, and it would be impossible within the time after Paul D. Perona was employed to ascertain the information of such witnesses and to properly prepare a defense.

The affidavit of Paul D. Perona stated that he had conferred with the defendant and Attorney Josef T. Skinner on December 17, 1954, at the residence of Mr. Skinner; that Mr. Perona then and there accepted employment to represent the defendant; that defendant stated the facts of his case, and he, Perona, believes the defendant has a good and substantial defense to the



information; that he was presently engaged in preparation for a hearing on review in a case before the Industrial Commission of the State of Illinois, which was set for January 11, 1954; that the case required a great deal of preparation for a hearing; and he was interested in another case pending in the Circuit Court of Putnam County which was set for trial on December 22, 1954; and that he has not had sufficient time to prepare the defense for his client. We must accept these affidavits as true as the defendant in error did not file any counter-affidavits or object to the form or substance of the affidavits.

The court overruled the motions for a continuance, and the case proceeded to trial. A jury was empaneled, and after hearing all of the evidence the jury found the defendant guilty as charged in the information. The court then assessed a fine against the defendant of \$250.00 and sentenced him to jail for five days. It is from this judgment that the defendant has prosecuted a writ of error to this court.

In the case of Dacey v. the People, 116 Illinois at page 562, in passing on the sufficiency of the application for a motion for a continuance, the court uses this language: "It is the right of every citizen, when indicted for an offense, to have a fair and impartial trial and compulsory process to compel the attendance of his witnesses, and that involves, as a matter of course, the time reasonably necessary to prepare for trial and find and produce testimony in his defense."

In the case of the People v. Dunham, 334 Illinois at page 521, the defendant had filed affidavits very similar to the ones that the defendant in the present case had filed, and in



passing upon the sufficiency of the affidavits we find the following: "No person accused of a serious crime should be forced to trial without a reasonable opportunity to employ counsel and properly prepare his defense. (People v. Singer, 288 Ill. 113.) Upon a proper showing that for want of time counsel has not been able to properly prepare the case, or that witnesses are not in attendance who might be found on time being given, or that the cause is not ready for trial for want of opportunity for preparation owing to no fault of the accused, the court, in the exercise of a wise discretion, should postpone the trial to a later day in the term or continue the cause, if necessary. (Dacey v. People, 116 Ill. 555; North v. People, 139 id. 81.)"

In the case of People v. Schraeberg, 340 Illinois at page 629, a similar question arose, and passing upon this we find the following: "By the denial of his motion for a continuance he was deprived of his constitutional right to appear and defend in person and by counsel. In People v. Blumenfeld, 330 Ill. 474, this court said: 'Plaintiff in error assigns as error the action of the court in overruling his motions for a continuance. While it is highly important that justice should be speedily meted out and that criminals should be punished with celerity and dispatch, it is much more important that before punishment should be inflicted upon a person accused of crime full opportunity should be given to place the court in possession of all the facts bearing upon the question of the guilt or innocence of the accused, so that



the court and jury may ascertain the truth as to whether or not the person accused is, in fact, guilty of the crime. Section 9 of article 2 of the constitution of this State provides that in all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel. This right includes reasonable time for counsel to prepare the defense. The constitutional guaranty that an accused shall have the assistance of counsel is not a barren right but one of inestimable value to him, and he should not be deprived of it by compelling counsel to go to trial unprepared and without an opportunity of studying the case. If the accused is to have the assistance of counsel, counsel must have adequate time to prepare to render such assistance. (State v. Pool, 50 La. Ann. 449.) A defendant's right to have counsel and to have his counsel prepare his case for trial is a substantial right, and to deny counsel sufficient time in which to prepare the case is the denial of a substantial right. -- Shaffer v. Territory, 127 Pac. 746.' The defendant in error has cited two cases in which the Supreme Court held that the trial court did not err in refusing to grant a continuance, but examination of those cases discloses that the reasons assigned for a continuance are totally different from the affidavit in the present case.

It is our conclusion that the trial court erred in overruling the motion for a continuance as the defendant was deprived of his rights to a fair and impartial trial and also erred in giving an instruction defining reasonable doubt. In People v. Flynor, 378 Illinois, at page 356, the court said:



"This court has frequently announced that an instruction should not attempt to define a reasonable doubt, as it is difficult in the extreme to find a more explicit definition of the term than the words themselves."

The plaintiff in error assigns as error other questions which we do not think it necessary to discuss, except we find that portions of the State's Attorney's argument to the jury were objectionable and the court erred in not sustaining objections thereto. Also there was an irregularity at the time the jury brought in their verdict, as the clerk of the court was not present and he should have been at all proceedings in the trial of the case. We do not pass upon the sufficiency of the evidence, ~~as that will be considered at the new trial.~~ Complaint is made also that the trial judge communicated with the jury while they were deliberating on their verdict. The supplemental abstract shows just what was done, and we do not think that anything prejudicial to the defendant's rights occurred on this account, but because of the court's error in not granting the motion for a continuance the judgment of the trial court is reversed and the cause remanded for a new trial.

Reversed and remanded.

JULIUS R. RICHARDSON  
CLERK PROBATE & DEEDS  
Appellate Court Room

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APPELLATE COURT  
STATE OF ILLINOIS  
FOURTH DISTRICT

Term No. 56-F-22

Agenda No. 11

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NELLA M. BLUE and CHARLES BLUE,	)	
	)	
PLAINTIFFS-APPELLEES,	)	
	)	Appeal from the
-v-	)	Circuit Court of
	)	St. Clair County,
ST. CLAIR COUNTRY CLUB,	)	Illinois.
	)	
DEFENDANT-APPELLANT.	)	

- - - - -

BARDENS, P. J.

This case was before us at the October Term, 1954, at which time we reversed the judgment of the lower court without remanding on the ground that the evidence showed no negligence of the defendant. See 4 Ill. App. 2d 284; 124 N. E. 2d 346. The Supreme Court granted leave to appeal and reversed our judgment and remanded the case to this court with directions to pass upon the other errors assigned. See 7 Ill. 2d 359; 131 N. E. 2d 31.

The facts of the case are sufficiently stated in the opinions above referred to and need not be repeated here. The other errors assigned pertain solely to the alleged error of the lower court in its refusal to grant a new trial.

The defendant first contends that the lower court committed error in its refusal to give an instruction tendered by the defendant concerning the defendant's contention that the injuries to



the plaintiff in question were proximately and solely caused by an "Act of God." The Supreme Court has, in our opinion, disposed of this question wherein they state that according to defendant's own testimony the whirlwinds that caused the injuries on the day in question were common in the vicinity during the hot summer months and should have been reasonably foreseen by the defendant.

Defendant also contends that there was error in the court's refusal to grant a mistrial upon the occasion of plaintiff's attorney inquiring of one of the defendant's witnesses, "You have been in the insurance business for a number of years, haven't you?" The plaintiff points out that this error is not assigned in the defendant's motion for a new trial and upon examination of the motion as abstracted we agree with plaintiff's contention. The only assignment of error in the motion for new trial that the defendant relies upon is item number 3 reading: "The verdict was the result of passion and prejudice, and was not the result of due consideration of the evidence and of the court's instructions." In our opinion this does not specify the grounds of such motion with particularity as is required by Section 8 of the Civil Practice Act, Paragraph 192, Chapter 110, Ill. Rev. Stat., 1953.

During the course of the trial the plaintiffs called as their witness Dr. Boyd H. Wilson, a mechanical engineer whose qualifications as an engineer and an expert in fluid mechanics are not questioned. Dr. Wilson testified that previous to the trial he had measured and weighed the beach umbrellas and the tables that had been mentioned in the evidence and had made calculations,



the plaintiff in question were proximately and solely caused by an "Act of God." The Supreme Court has, in our opinion, disposed of this question wherein they state that according to defendant's own testimony the whirlwinds that caused the injuries on the day in question were common in the vicinity during the hot summer months and should have been reasonably foreseen by the defendant.

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During the course of the trial the plaintiffs called as their witness Dr. Boyd H. Wilson, a mechanical engineer whose qualifications as an engineer and an expert in fluid mechanics are not questioned. Dr. Wilson testified that previous to the trial he had measured and weighed the beach umbrellas and the tables that had been mentioned in the evidence and had made calculations,



using aerodynamic principles, that a wind of a certain velocity exerting its maximum force on a beach umbrella of the size the defendant had on the day of the occurrence would lift a certain number of pounds. Defendant contends that this was testimony concerning the result of experiments and inadmissible without a showing that all the essential conditions of the experiment were identical with those existing at the time of the occurrence in question. This point likewise was not specifically set out in the motion for a new trial. However, it should be pointed out that the testimony of Dr. Wilson was not of an experiment but consisted of calculations upon the principles and tables of aerodynamics applicable to the particular equipment that was used by the defendant at the time of the occurrence. Furthermore, while there was no evidence of the velocity of the wind at the time and the evidence might for that reason be deemed immaterial, we fail to see how it could have been prejudicial for the reason that evidence to the effect that the wind did lift the umbrellas and blow some of the tables was uncontradicted.

Finally, the defendant argues that the verdicts were contrary to the manifest weight of evidence. On this question the defendant states that the plaintiff, Nella M. Blue, was the only witness on either side of the case who gave evidence concerning what transpired at the actual time of her injury and that Mrs. Blue testified to three conflicting versions of the manner in which she sustained injury. We have read the abstract of Mrs. Blue's testimony and do not agree that there were conflicting versions given by her. The defendant, by way of impeachment, read from



a signed statement by Mrs. Blue and certain answers that were read from the statement that seemed to be at variance with her testimony were denied by Mrs. Blue. Thus, the question before the jury was a matter of credibility and weight of evidence and the fact that the jury gave credence to her testimony on the witness stand rather than to statements attributed to her and which she denied making does not justify a finding that the verdict was against the manifest weight of evidence.

Having now considered the other errors assigned and finding no reversible error therein, the judgment of the lower court will be affirmed.

Judgment affirmed.

Culbertson, J., and Scheineman, J. concur.

Publish abstract only.

**FILED**  
JY 5 - 1956  
*David J. Mallott*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



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STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

101A<sup>2d</sup> 152

February Term, A. D. 1956

Term No. 56-F-10

Agenda No. 4

WILLIAM WEBB, Administrator of the	)	
Estate of Linda Diann Webb,	)	
Deceased,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	Madison County.
	)	
HOMER HENKE,	)	
	)	
Defendant-Appellant.	)	

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CULBERTSON, J.

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This is an appeal from a judgment of the Circuit Court of Madison County in favor of WILLIAM WEBB, as Administrator of the Estate of Linda Diann Webb, deceased (hereinafter called plaintiff), as against HOMER HENKE (hereinafter called defendant), in the sum of \$15,000.00. The judgment was predicated on the verdict of a jury in the original sum of \$20,000.00, reduced by remittitur in the Trial Court, in the sum of \$5,000.00.

On appeal in this Court, Defendant contends that the Court below erred in the giving of



certain instructions on behalf of Plaintiff; in refusing defendant's right to a proper question on the voir dire examination; and that the Court erred in permitting plaintiff in closing argument to misstate the law and appeal to the sympathy of the jury. There is also a contention that the judgment was excessive and the result of the errors assigned.

It will only be necessary to state briefly that plaintiff's intestate, the infant daughter of plaintiff, was riding with plaintiff on his truck which was operated by propane gas. A collision with the defendant's automobile caused the propane truck to be overturned and burned both defendant's wife and infant daughter to death. Questions of fact in the case were in dispute but were resolved by the verdict of the jury.

We are principally concerned with the error which is assigned relating to the argument of counsel for plaintiff, and believe it is of sufficient significance to require that such argument, as reported, be set forth specifically. Counsel for plaintiff, in the final argument to the jury, stated:

"But the law says, Ladies and Gentlemen, that where the relationship of parent and child exists, that there is a presumption that the parents lose a substantial amount without any proof, by the death of their children. And Mr. Reed was right, I don't think that



there is a father or mother in this world that ever brought a child into the world for the purpose of making money. We buy cattle and hogs and feed them for that purpose, but we don't raise children like that. Pecuniary value, Ladies and Gentlemen, is not the money that that child brings to you. You can't give any allowance here because this man is bereaved or heartbroken because of the death of this child, but, pecuniary value in law means this-- it is value that you, as jurors, get out of your children. Is it worth something to you every night to have a little daughter like that come and kiss you good night? Is it worth something to you to see that little girl go through school and graduate from the eighth grade, then later probably be valedictorian of the class and given an oration? And is it worth something to you, Ladies and Gentlemen, in the future to know that you have raised a family ---"

Counsel for defendant objected to the argument on the ground that it was not a proper definition of pecuniary value. The ruling of the Court was: "It may stand. You may proceed." Plaintiff's Counsel then proceeded to say:

" --- Yes, value. These are the things that are worth money. That is what we live for.\*\*\* It is those things in life that mean more to us than any money anybody ever spoke of, and that, Ladies and Gentlemen, is what has been taken away from this man, and the fact that after this terrible catastrophe that this man should find himself married again don't bring back that little daughter. It don't bring back to him things he lost because of her ungodly death. There was no occasion for that death, and don't let them fool you, Ladies and Gentlemen, in this case."

On appeal in this Court the plaintiff asserts that there is no precise definition of pecuniary value and that any deprivation of benefits present and future which can be measured in monetary terms can be considered (CITY OF CHICAGO vs. KEEFE, ADMR., 114 Ill. 222, 230). It is also



contended that since the entire argument made by both counsel for plaintiff and for defendant was not preserved in the record, the Courts, on appeal, should not consider an alleged claim of prejudice (LINDROTH vs. WALGREEN CO., 338 Ill. App. 364, 383; WALSH vs. CHICAGO RY. CO., 303 Ill. 339, 351; ROWOLDT vs. COOK COUNTY FARMERS MUTUAL INS. CO., 305 Ill. App. 93, 101). The ruling is based on the sound consideration that an argument complained of may have been provoked by a plaintiff in answer to one by the complaining party.

It is pointed out, however, that it is the practice in the Circuit Court of Madison County not to have final arguments reported as a matter of course, and that when objections are made to arguments the reporter is called in by the Court and a record made of the objectionable argument and the objections made thereto. This was done in the instant case. We have carefully noted the nature of the argument made and while normally the Court, on appeal, would be disposed to adhere to the Ruling that a reversal should not be based upon the record of a portion of the argument, it is obvious that the argument made could not have been made responsive to any argument made by opposing counsel. It is further apparent from



the nature of the argument that it was an improper argument and did not correctly advise the jury of the nature of pecuniary loss which can be considered by the jury.

We are convinced that the greatest latitude, consistent with precedents, and reasonable interpretation thereof, should be given to counsel in closing argument, but we find no basis whatsoever upon which the type of argument referred to in this opinion could be justified. Counsel could have referred to the presumption of pecuniary loss in his closing argument, but it was clearly improper to indicate that pecuniary loss involves any such consideration as "having a little daughter give a goodnight kiss," or, "seeing a child graduate from the eighth grade," or, "become a valedictorian," or, "given an oration." Pecuniary loss in this State does not by definition include such sentimental values or affection (CONOVER vs. HARRISBURG & SOUTHERN COAL CO., 161 Ill. App. 74, 79; EAST ST. LOUIS ELECTRIC STREET RY. CO. vs. BURNS, ADMR., 77 Ill. App. 529, 533; CHICAGO & ALTON R. R. CO. vs. SHANNON, ADMR., 43 Ill. 338, 346).

In view of the fact that the verdict was for the maximum amount, and even though a \$5,000.00 remittitur was ordered in the Court



below, we do not believe that this Court, on appeal, can cure such error by remittitur, and that it is necessary to reverse and remand this cause for a new trial.

The other errors assigned by defendant, in themselves, would not have constituted reversible error. We do not believe that it is of value to discuss such assignments in detail in view of our determination in this cause.

The judgment of the Circuit Court of Madison County will, therefore, be reversed and this cause will be remanded for a new trial.

Reversed and remanded.

BARDENS, P. J., and SCHEINEMAN, J., concur.

Publish abstract only.

**FILED**  
MAY 5 - 1956  
*David G. Mallitt*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



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STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

10 I.A.<sup>2d</sup> 152

February Term, A. D. 1956

Term No. 56-F-19<sup>9</sup>

Agenda No. 13

JOE OEHLERT,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	
JOHN W. YOUNGMAN,	)	
	)	
Defendant-Appellee,	)	Appeal from
(Replevin.)	)	the
	)	Circuit Court
and	)	of
	)	Jackson County,
JOHN W. YOUNGMAN,	)	Illinois.
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
JOE OEHLERT,	)	
	)	
Defendant-Appellant.	)	
	)	
(Claim for Damages and Feeding	)	
Six Pigs.)	)	

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CULBERTSON, J.

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This case is before us as the result of  
an original replevin action in a Justice of the  
Peace Court for six pigs, pursuant to which the



Appellee, JOHN W. YOUNGMAN (hereinafter called defendant), gave a forthcoming bond. Youngman then filed a civil suit for damages to corn and pasture land, and for feeding of the six pigs. Both cases came before the Justice of the Peace and were tried, with the result that a judgment was entered in favor of the defendant in the replevin action and plaintiff in the damage suit, in the sum of \$132.00 and costs.

After an appeal to the Circuit Court of Jackson County, the cases were consolidated for trial, and the suits were tried together. Plaintiff acted as his own counsel in the trial of the cases. After hearing, a judgment was then entered in favor of the defendant as against the plaintiff, JOE OEHLERT, for damages and feeding costs of \$255.00. There was an incidental order that the pigs be sold in default of payment and the money deposited with the Clerk of the Circuit Court. A motion for a new trial and to set aside the judgment was filed on behalf of plaintiff and denied by the Trial Court.

On appeal in this Court it is contended that the Court below erred in entering judgment in excess of the ad damnum referred to on the back of the original summons, as "\$152.50"; and also on the ground that the Court ignored a counter-



claim filed by plaintiff in the cause. We have examined the abstract of record and the brief submitted on behalf of the appellant, and find no substantial reason for a reversal. The abstract in this case fails to properly abstract the ad damnum on the summons, the nature or amount of the judgment, and the counter-claim that was filed. This Court will not search the record for the purpose of reversal.

It would serve no purpose to review the testimony since the consolidation of the causes of for trial was apparently made without objection, and the finding of the Court, in so far as we can determine from the briefs and abstract, is sustained by the record. The judgment of the Circuit Court of Jackson County will, therefore, be affirmed.

Affirmed.

Memorandum opinion.

BARDENS, P. J., and SCHEINEMAN, J., concur.

Publish Abstract only.

**FILED**  
JY 3 - 1956  
*David J. Mallett*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



554A met.

Abstract

No. 10852

Agenda 1

In The

10 I.A. 153

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1956

FILED

MAY 12 1956

JULIUS R. RICHARDSON

CLERK, PROTEMPORE

Appellate Court Second District

SIGMUND J. TARVID,

Plaintiff-Appellant

- vs -

MARGUERITE S. TARVID,

Defendant-Appellee

)  
) Appeal from the  
) City Court of  
) Aurora.  
)

EOVALDI, -- J.

This is an action for divorce by the husband, with a prayer for adjustment of property rights between the parties, and for determination of the custody of their minor child. The wife answered and filed a counterclaim for separate maintenance, with a prayer for custody and support of minor child and for attorney's fees. The parties were in Court in June, July, October, November and December, 1954. After hearing all of the evidence, the court dismissed the complaint for divorce for want of equity, and granted defendant a decree for separate maintenance, with other relief. Upon the denial of plaintiff's motion to vacate the decree, this appeal has been taken.

Appellant's theory is that there is no evidence to support an award of separate maintenance; that the court, having dismissed the complaint for want of equity,

4-2-58

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U.S. R. R. RICHARDSON  
CLERK, PROTESTANT  
U.S. R. R. RICHARDSON

lacked power to settle property rights; and that the court erred in denying plaintiff a divorce on the grounds of desertion.

We shall take the last contention of appellant first. Plaintiff and defendant at the time of the hearings were 38 and 29 years of age, respectively. They were married in February, 1951, at a time when plaintiff was building a home which he had commenced in May, 1950. The parties arranged to stay at the home of defendant's parents until the new house could be occupied. On May 1, 1952, they moved into the new house and lived together there until March 3, 1953, at which time defendant left the home with their child, born June 25, 1952, and went to her parent's home where she and the child have remained since. Plaintiff continued to live at the new house. On February 20, 1952, the parties argued about the problem of entertaining and about other matters between them. On February 23, 1952, plaintiff told defendant and her parents that the marriage had "gone to pot". On July 16, 1952, and at other times, they argued about naming their child and plaintiff asked his wife to leave. Suffice it to say that arguments over matters of no consequence continued until the time of the separation on March 3, 1953. On the day before, plaintiff came home from work about 3:00 P.M. and they again argued, and plaintiff grabbed defendant's arm, and according to defendant, plaintiff "stood up and said he wanted her to get out and wanted a divorce". On March 3, plaintiff went to work, and when he returned he found his wife and child gone and a note for the milkman to deliver to the parent's home. Plaintiff denies he told defendant on March 2 or at any other



time that he wanted her to get out and wanted a divorce. Later, and about March 12, 1953, defendant telephoned plaintiff. According to plaintiff, defendant asked what he was going to do and he said "nothing", and they agreed that she should come for the baby's crib, which she did that evening. According to defendant, she asked if he still felt the same, to which he replied she could get out and stay out, and they agreed she could come for some of her and the baby's needs, which she then did.

It is well settled law that if a party consents to a separation, and its continuance, and has not revoked such consent, he is not entitled to a divorce, and if such appears in defense, it is a bar to the action. *Larimore v Larimore*, 299 Ill. App. 547; *McCartney v McCartney*, 343 Ill. App. 533; *Maxwell v Maxwell*, 333 Ill. App. 625. The lower court in its opinion filed in the cause found from a review of the evidence in the case, and from the usual observations of the conduct of the parties throughout the proceedings, that

"\* \* \* It appeared to the court that the leaving on the part of the wife was predominantly caused by the express wishes and actions of the plaintiff, and, even though there was some evidence of denial on the part of the plaintiff that he had, on several occasions, asked the wife to leave, his conduct, other than his stated words to the court, indicated a desire that she do leave, and that she not return to resume the marital home."

His findings are supported by the evidence in this case. The defendant testified that on at least 5 separate dates, the plaintiff had told her to get out, that he wanted a divorce. Her testimony is supported on one of these occasions by the testimony of her mother and father. When a decree is



entered by the chancellor upon conflicting testimony as to the facts and findings on which it was based, the Appellate Court is not justified in reversing that portion of the decree which is dependent upon the weight and credibility to be given to the testimony of the parties. *Marcy v Marcy*, 400 Ill. 152; *Podgornik v Podgornik*, 392 Ill. 124. It is our conclusion that the chancellor properly found that plaintiff was not entitled to a divorce from defendant, and that the court did not err in dismissing his complaint for divorce.

From the evidence it appears that the plaintiff had been paying defendant \$25.00 per month for the support of the child. No contention is made by appellant that the sum of \$50.00 per month ordered paid by the chancellor--\$10.00 for defendant and \$40.00 for the support of child--is an unreasonable sum under the circumstances of the parties. Rather, his contention is that the record fails to show any cause for defendant's leaving him and living separate and apart, and further, that the evidence fails to show that defendant's living apart was without fault on her part.

A detailed recitation of the evidence in this case is not necessary to reach the conclusion that the conduct of the plaintiff in requesting a divorce and in requesting defendant to leave was the principal reason for defendant's nervous condition and was the principal reason for her leaving. Defendant's uncontroverted testimony is that about the time the parties separated she weighed 93 pounds and that she ordinarily weighed 132 pounds; that she lost 32 pounds in three weeks; that mentally "she was very down



in the dumps"; that she was not able to sleep normally, but would wake up periodically and not go back to sleep.

On October 20, 1952, the plaintiff's telling defendant to get out and that he wanted a divorce, caused her to shake and have chills necessitating her going to bed. "I began trembling. I never was so nervous in my life \* \* \* and the shaking never quit until I went to sleep. \* \* \* I was as cold as ice and it was warm in the house." On the evening of November 26, 1952, they were invited to a cousin's wedding. Defendant testified, "We had sent our gift and planned on going. I asked him should we go around seven and he said, 'I am not going,' and I said, 'Why not, don't you feel good, what is wrong?'" and he said, 'Marge, there is no need of going on, I want a divorce, and I want you to get out. All we have to do is extend our congratulations,' and he refused to go. \* \* \* We did not go anywhere that night. He slept in the sleeping bag, which he did every time, every three or four nights, and after he got over it he would come back and sleep in the bed." On the occasion previously referred to of March 2, 1953, the day before defendant left, defendant testified that plaintiff stood up and said, "I want you to get out and I want you to get a divorce"; and that plaintiff twisted defendant's arm and screamed that he wanted a divorce. In *Abraham v. Abraham*, 403 Ill. 312, 313-314, our Supreme Court said:

"In the first instance, the appellant claims the evidence is insufficient to merit the relief prayed for by the plaintiff. It must be kept in mind that the measure of proof and grounds of relief are not the same in cases for separate maintenance as they are in cases of divorce. In *Johnson v. Johnson*, 125 Ill. 510, we established the principle governing such cases, and in which we held that where



a wife is not at fault she is not bound to live and cohabit with her husband if his conduct is such as to directly endanger her life or health, or 'where the husband pursues a persistent, unjustifiable and wrongful course of conduct toward her, which will necessarily and inevitably render her life miserable, and living as his wife unendurable. \* \* \* If the husband voluntarily does that which compels the wife to leave him, or justifies her in so doing, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions. And if he so intended, her leaving him would, in the case put, be desertion on his part, and not by the wife.' The principle declared in the Johnson case has been followed and approved in Holmstedt v Holmstedt, 383 Ill. 290."

In Wynekoop v Wynekoop, 407 Ill. 219 & 226, the Supreme Court stated:

"When testimony is contradictory, this court will not substitute its judgment as to the credibility of witnesses for that of the trial court which saw and heard them, and will not disturb the findings unless they are manifestly against the weight of the evidence. Schnepfer v. Ashlock, 404 Ill. 417; Evangeloff v. Evangeloff, 403 Ill. 118."

It is our conclusion that the court properly found that the defendant was living separate and apart from the plaintiff without her fault, and that the court properly entered a decree of separate maintenance.

The remaining question in the case deals with the decree of the lower court seeking to adjudicate property rights of the parties. The jurisdiction of a court hearing divorce matters depends on the grant of the statute and not upon its general equity powers. Marcy v Marcy, Supra; Anderson v Anderson, 380 Ill. 435; Smith v Smith, 334 Ill. 370. While plaintiff prayed in his suit for divorce for



an adjustment of the property rights of the parties, this prayer fell with the finding by the lower court that plaintiff was not entitled to a divorce, and by the dismissal of plaintiff's complaint for want of equity. In her counterclaim for separate maintenance, defendant did not ask for an adjustment of the property rights. Actions for separate maintenance in Illinois are governed solely by statute. §§22, 23, Ch. 68, Ill. Rev. Stat., 1955; Plotnitsky v Plotnitsky, 241 Ill. App. 166, 169; Reifschneider v Reifschneider, 144 Ill. App. 119, 127. Our separate maintenance statute does not mention or grant to the courts the power to settle property rights. The courts have considered this omission in the statute to be significant and persuasive. McAdams v McAdams, 267 Ill. App. 124, 132. That the trial court is without jurisdiction to adjudicate the property rights of the parties in a decree for separate maintenance has long been the rule in Illinois. Wolkau v Wolkau, 158 Ill. App. 341, 344; McAdams v McAdams, Supra; Pearsons v Pearsons, 282 Ill. App. 92, 108; Petta v Petta, 321 Ill. App. 512, 521; Olmsted v Olmsted, 332 Ill. App. 454, 456.

It is true that in some cases in Illinois our courts have settled the property rights of the parties in awarding separate maintenance, but a careful analysis of these cases reveals that the parties to the separate maintenance suit requested in their pleadings an adjustment of their property rights and submitted evidence thereon. As heretofore pointed out, defendant in her counterclaim must have recognized the law in Illinois for she did not in said counterclaim seek any relief other than that which is usually prayed for in separate maintenance suits, that is,

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"that plaintiff be compelled to provide separate maintenance and support for defendant and said minor child according to the laws; that the court award custody of said child to defendant; that plaintiff be decreed to pay defendant reasonable attorney's fees for conduct of this litigation; and that defendant have such other and further relief as equity may require".

We are of the opinion that the trial court was without power to adjudicate and adjust the property rights of the parties herein, and that the court erred in attempting to do so. The portion of the decree seeking to adjust the property rights of the parties is reversed. The remainder of the decree is affirmed.

Decree reversed in part and affirmed in part.

*Howe P.J. Concur.*

Crow, J. Concur





THE JOURNAL OF THE  
ROYAL ANTHROPOLOGICAL INSTITUTE  
LONDON  
Vol. 10, Pt. 1, 1910

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THE JOURNAL OF THE

ROYAL ANTHROPOLOGICAL INSTITUTE

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Vol. 10, Pt. 1, 1910

THE JOURNAL OF THE

ROYAL ANTHROPOLOGICAL INSTITUTE

This is a copy of the Journal of the Royal Anthropological Institute, Vol. 10, Pt. 1, 1910. The Journal is published by the Royal Anthropological Institute, 21, BEDFORD SQUARE, LONDON, W.C.1. The Journal is published quarterly, and contains original researches and reviews in the field of anthropology. The Journal is published by the Royal Anthropological Institute, 21, BEDFORD SQUARE, LONDON, W.C.1. The Journal is published quarterly, and contains original researches and reviews in the field of anthropology.

Under the heading "Questions in the Case" plaintiff poses several questions as to whether under certain facts assumed to be true, the defendant would or would not be liable. From the nature of these questions and the fact that no other error is pointed out, we take it to be plaintiff's theory that the decision of the Trial Court is against the manifest weight of the evidence.

Facts not appearing to be in dispute are that on May 7, 1952, plaintiff applied to the defendant for what is known as Dram Shop insurance on a tavern operated by one Charles Hursey in a building owned by plaintiff in Champaign, Illinois; that a policy was issued and delivered to plaintiff; that on September 17, 1952 a suit for damages under the Dram Shop Act was filed against plaintiff and the said Charles Hursey in the Circuit Court of Champaign County; that on September 17, 1952 summons was served upon plaintiff in said action; that no defense was made to the suit resulting in a default judgment being taken against the plaintiff on November 10, 1952; that on January 3, 1953 an execution issued under said judgment was levied upon plaintiff's automobile; that plaintiff thereupon went to the defendant's office and informed defendant of the levy; that Mrs. Elizabeth Miller, who was employed by the defendant, upon examining plaintiff's file in the office found the summons which had been served upon the plaintiff in the Dram Shop suit; and that the policy did not cover the occurrence which was the subject matter of the suit against plaintiff.



Since plaintiff indicates his intention not to argue the issue as to when the insurance was put in force, the sole question remaining is whether the plaintiff under the evidence was shown to be free of contributory negligence and whether the defendant was guilty of the negligence with which he was charged.

The specific negligence charged against the defendant as it appears from the complaint is that the defendant accepted delivery of the summons in the Dram Shop action from the plaintiff and lulled plaintiff into a false sense of security by assuring him that the company would look after the matter, which caused the plaintiff to rely thereon and not to make a legal defense against the action.

The evidence on the question as to whether the plaintiff was negligent as alleged appears to be in sharp conflict. Plaintiff testified that on September 13, 1952 he took the summons to his lawyer who advised him to take it to the insurance office; that on the same day he took the summons to defendant's office and gave it to Mrs. Miller; that he said to her "I have got something from the courthouse for the tavern over there - so you can see into it on my insurance"; that the clerk told him she would take care of it; that he knew the summons pertained to the tavern; that he was in defendant's office a number of times between September 18, 1952 and January 3, 1953; that on these occasions he talked with the defendant or his clerk about an insurance claim pertaining to an automobile; that on January 3, 1953 the sheriff levied on his car; that he then went to

James G. Thompson, Secretary of the American Society for the Advancement of Science

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defendant's office; that at that time the clerk pulled out plaintiff's insurance file from a cabinet and found the summons in it.

Mrs. Miller testified that plaintiff did not give her the summons as he claimed; that he was in defendant's office five or six times between September and the latter part of December in 1952; that on none of these occasions did plaintiff say anything to her about the summons or about the Dram Shop case; that she did not see the summons in the office until November 11, 1952 when she found it in a wooden file basket on her desk; that she saw plaintiff's name on it and placed the same in his file; that when plaintiff came into the office on January 3, 1953 she got out the file and found the summons in it; and that she then said to the plaintiff "Mr. Jackson this is the first I have heard of this".

The defendant testified that he first saw the summons on January 5, 1953; that he recalls seeing the plaintiff in his office four times between September 17, 1952 and January 5, 1953; that plaintiff said nothing on the occasion of any of these visits concerning the Dram Shop case and that the defendant did not know of the existence of such a case.

In view of this testimony the Trial Court was called upon to decide a disputed fact question. In such a situation its findings will not be disturbed unless the same are clearly and manifestly against the weight of the evidence. In Vladoff

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January 1974

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v. Ill. Bankers Life Assurance Co. 320 Ill. App. 387, the Court states the rule to be that:

"The findings of the trial court in a case tried without a jury, are binding on the Appellate Court, unless such findings are clearly and manifestly against the weight of the evidence. They are entitled to the same weight as the verdict of the jury (Woarter v. Mahler, 314 Ill. App. 324), and, if there is substantial evidence to support the findings of the trial court, such findings will not be disturbed, even though, on a review of the evidence, this court might be disposed to come to a contrary conclusion (Chamblin v. New York Life Ins. Co., 292 Ill. App. 532)."

This rule is so well established as to require no further citation of authority. In the instant case we cannot say that there was a lack of substantial evidence to support the Trial Judge's conclusion. The question as to whether the testimony of defendant's witnesses was more worthy of belief than that given by plaintiff was for the Trial Court. He saw and heard the witnesses testify and in discharging the function of determining the credibility of their testimony and the weight to be accorded thereto was in a far better position to properly do so than is this Court which of necessity must rely entirely upon the printed record of the trial proceedings.

The testimony of the plaintiff that he delivered the summons to defendant's office and that defendant's agent told him that it would be taken care of is directly contradicted by the testimony of Mrs. Miller. The defendant's testimony that plaintiff did not mention the Dram Shop case on the occasion of



any of his numerous visits to defendant's office despite the fact that he knew the summons pertained to the tavern must be taken as corroborative of the testimony of Mrs. Miller.

The Trial Court apparently determined that the testimony of the defendant's witnesses was entitled to greater weight than that given by the plaintiff. This Court cannot say that in so doing, the Trial Court erred.

Upon consideration of the whole record in the case, we are of the opinion that the conclusion reached by the Trial Court is not manifestly and palpably against the weight of the evidence and its judgment will therefore be affirmed.

Affirmed.



522-A

46721

IN THE MATTER OF THE ESTATE OF  
ULREH VOGT, Deceased.

FRANCES VOGT,

Appellee,

v.

ULREH VOGT, JR., As Administrator  
With Will Annexed of the Estate  
of Ulreh Vogt, Deceased,

Appellant.

101A. 333<sup>2d</sup>

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding to set off a widow's award. Petitioner was allowed \$3,000 in both the Probate Court and, on a trial de novo, in the Circuit Court after defendant's pleading was stricken. Defendant has appealed.

Ulreh Vogt, Sr. died testate August 3, 1952 and left surviving him, the petitioner, his widow, a son, the respondent administrator, and a daughter, children of a previous marriage. The will made no provision for petitioner, stating testator had paid her, under a postnuptial contract, \$10,000 in full settlement of her interest in his estate. The will was probated and petitioner was adjudged the surviving spouse. She renounced the will and filed a petition in the Probate Court for a widow's award, alleging her residence in Illinois and her status as decedent's surviving spouse.

The administrator admitted petitioner was the surviving spouse by reason of her marriage to decedent in March 1919. He asked dismissal of the petition on the ground that

“... ..”

Figure 1. The effect of the number of trials on the number of correct responses. The number of correct responses was significantly higher than the number of incorrect responses in all cases.

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 3. Identify the purpose of the text.

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1. *Phragmites australis* (Cav.) Trin. ex Steud. (Common reed)

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• Conduct - How you do it. How you do it is more important than what you do. How you do it is more important than what you do.

the postnuptial contract estopped petitioner's claim. Petitioner replied that the agreement was against public policy and therefore void in purporting to relieve decedent of his obligation to support. The Probate Court sustained petitioner's position on the issue in appointing appraisers to set aside the award, in overruling the administrator's objections to the appraisers' report and in allowing the award of \$3,000. The administrator appealed to the Circuit Court.

In the trial de novo petitioner moved to strike the administrator's answer on the ground that the postnuptial agreement was against public policy. The answer was stricken. An amended answer was filed denying petitioner was the surviving spouse and again relied on the agreement, asserting that despite a provision therein attempting to relieve decedent of his obligation to support, the latter had nevertheless supported petitioner until his death. Petitioner moved to strike, attaching to the motion several exhibits. These were: the administrator's sworn application for letters which described petitioner as the wife of decedent; the declaration of heirship, judging petitioner to be decedent's spouse; and the transcript of the administrator's sworn testimony in the Probate Court that the petitioner was decedent's second wife.

Petitioner's motion to strike the amended answer was sustained and the widow awarded \$3,000. The appeal to this court is from that order.

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The question is one of law, whether the amended answer presented a defense to the petition for the award.

It is admitted by defendant that the non-support provision of the agreement is a nullity. He contends, however, that the provision was not intended to operate, as shown by its non-operation for thirty years, and was irrelevant and valueless. He argues that the provision was not a material part of the consideration and does not nullify the balance of the agreement, especially since petitioner has for so long acknowledged the non-validity of that support provision.

The preamble in the agreement recites that "the wife asks said husband to make an immediate settlement of Ten Thousand Dollars (\$10,000) in cash, . . . in lieu of all right. . . ." The agreement provides:

"Now Therefore, in settlement . . . of all property . . . rights. . . husband does hereby pay . . . .

. . . and the said wife has received . . . Ten Thousand Dollars . . . in lieu of all and every right . . . .

And in consideration for said Ten Thousand Dollars . . . said wife does hereby release . . . said husband from all obligation of support, and from all other claims, rights . . . ."

We think the release of the duty to support was a material part of the consideration and rendered the entire agreement void as against public policy. (Lyons v. Schanbacher, 316 Ill. 569, 574.) This conclusion is unaffected by any construction the parties may have placed on the agreement by their conduct (Threw v. Threw, 410 Ill. 107, 112); and the decision of the Supreme Court in the recent



case (June, 1955) of Laleman v. Crombez, 6 Ill. 2d 194, does not affect our conclusion.

The court in Laleman v. Crombez overruled Lyons v. Schanbacher to the extent that "it is inconsistent with the views expressed in this opinion." The issue in the Laleman case was whether the plaintiff husband's surrender of rights in his wife's estate was unenforceable because the agreement included her release of his obligation to support her. The husband sought to gain an interest in his wife's estate on the ground that the release rendered the entire agreement void. The court refused to invalidate the entire contract because public policy--protection of the wife and the public--would not be advanced by doing so, and the husband had reaped the benefits of the release of support.

Even if the agreement were valid it could not be effective to deprive petitioner of her right to a widow's award. Under Section 182 of the Probate Act (Ill. Rev. Stat. 1953, Chap. 3, Par. 334) the widow is entitled to the award unless there is express waiver and the widow does not renounce the will. (In re Estate of Guttman, 349 Ill. App. 58.) In the instant case the provisions, pertinent on this point, are that petitioner:

"received and accepted . . . \$10,000 . . . in lieu of all and every right, title, interest or claim she now has or may have in the future in and to the property of said husband, including her right of dower.

And . . . said wife does hereby release and discharge said husband . . . from all other claims, rights and duties arising out of said marital relation."



These provisions do not expressly provide that the \$10,000 was in lieu of petitioner's award, and petitioner renounced under the will; therefore, the award was not relinquished.

This court in In re Estate of Guttman considered an antenuptial agreement which was "to make . . . provision . . . in lieu of any rights which Rose Blair might or could have as a wife or widow . . . in any property, real, personal, or mixed . . . ." (Page 60.) The agreement provided ". . . Rose Blair does hereby forever waive . . . any and all rights which she, as the wife or widow of Samuel Guttman, might otherwise have either as dower . . . or by virtue of any statutory provision made for her benefit in lieu of dower, or might have to a distributive share . . . under any statutes . . . ." (Page 61) The court decided the language was not broad enough to show an intention to relinquish the claim for widow's award. The case of Yockey v. Marion, 269 Ill. 342, and the cases it relied on to decide, in that case, that the widow's award was relinquished, preceded the enactment of Section 182 of the Probate Act and are thus distinguished. (In re Estate of Guttman.) In Guhl v. Guhl, 376 Ill. 100, the contract recited that the parties contemplated disposition of the "widow's award rights" and the court held that this was sufficient to relinquish the widow's award, even though the word "relinquish" was not used. The term "widow's award" does not appear in the instant agreement.



The administrator argues that petitioner is estopped to deny the validity of the postnuptial contract because she retained the benefits received. He cites Dill v. Widman, 413 Ill. 448, in support of that argument. There the widow waived dower and elected to take a one-third interest in decedent's real estate, while retaining 111 acres of land received under an agreement "in full settlement of any and all interest she might have as my said wife in my estate." In that case there was no question of waiver of the widow's right to a widow's award, as in the instant case. This distinction renders Dill v. Widman inapplicable.

Petitioner's motion to strike the amended answer admitted she was not the surviving spouse. If this were true, petitioner could not prevail. Exhibits made part of the pleadings control the allegations (Bertlee Co., Inc. v. Ill. Pub. & Print. Co., 320 Ill. App. 490, 495), but the showing in exhibits or prior pleadings of an inconsistency or contradiction does not remove the possibility of proof to resolve the inconsistency or contradiction. We cannot predict that the administrator cannot offer proof to support the issue his denial has created. The exhibits could, in the event that proof is offered, be used for impeachment purposes. The trial court erred, in the face of the issue on the pleadings, in finding plaintiff was the surviving spouse. This issue was not controlled by the ruling on the questions of the postnuptial agreement. The trial court erred in striking the amended answer and allowing the award.

The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ . It is shown that the system (1) has solutions for arbitrary values of the parameters  $\alpha$  and  $\beta$  if and only if the conditions (2) are satisfied. The second part of the paper is devoted to a detailed study of the properties of the solutions of the system (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ . It is shown that the solutions of the system (1) are unique and depend continuously on the parameters  $\alpha$  and  $\beta$ . The third part of the paper is devoted to a study of the asymptotic properties of the solutions of the system (1) for large values of the parameters  $\alpha$  and  $\beta$ . It is shown that the solutions of the system (1) approach a certain limit as the parameters  $\alpha$  and  $\beta$  approach infinity.

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For the reasons given the judgment order is reversed and the cause is remanded for further proceedings limited to the issue of whether petitioner is the surviving spouse.

REVERSED AND REMANDED  
WITH DIRECTIONS.

FEINBERG, J., CONCURS.

LEWE, P.J., TOOK NO PART.

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[illegible]

1. *Pharmaceutical industry*

[illegible]

523 A

46819

PEOPLE OF THE STATE OF ILLINOIS,	)	ERROR TO
Defendant in Error,	)	
v.	)	MUNICIPAL COURT
RUTH BROPHY,	)	
Plaintiff in Error.	)	OF CHICAGO.

101A. 2d 34

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review the conviction of defendant, Ruth Brophy.

In this court the state raises the question of the jurisdiction of the trial judge to certify the bill of exceptions.

February 15, 1955 defendant's motion for a new trial was denied and judgment entered on the verdict. The record discloses that May 19, 1955 the "time for appeal" was extended 60 days. We presume this order was intended to extend the time 60 days beyond the limit of one hundred days allowed by Supreme Court Rule 70A (Ill. Rev. Stat. 1953, Chap. 110, Sec. 259.70A). The one hundred days would have expired May 25. Thus the time for filing was extended to July 24. On July 19, 1955 a 30-day extension was granted to August 23, 1955 for the filing of the bill of exceptions. On August 19 defendant moved for leave to file the bill of exceptions. The motion was ordered "continued to September 15th." On that latter day it was ordered filed.

Supreme Court Rule 70A required that the bill of exceptions be "submitted" to the trial judge for certification

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-2-

and "filed" within the one hundred-day period, "or within such period thereafter as shall, during such one hundred (100) days, be fixed by the court, or in such further time as may be granted within any extended time." We consider the order of August 19, 1955 a further extension and the filing on September 15 a compliance with the rule.

The defendant contends that the record shows a reasonable doubt of her guilt.

Our Supreme Court has said that:

"In criminal cases it is the duty of this court to review the evidence, and, if there is not sufficient credible evidence, if it is improbable or unsatisfactory, or not sufficient to remove all reasonable doubt of defendant's guilt and create an abiding conviction that he is guilty, the conviction will be reversed." People v. Sheppard, 402 Ill. 347, 351.

The testimony in the instant case is uncontroverted that after defendant was booked following her arrest she was hemorrhaging, had a temperature of 103 degrees, and the doctor feared for her life if she were not taken to the hospital immediately; that she was taken to the County Hospital where she was shackled in bed, guarded by matrons around the clock for twelve days while being built up for surgery; that thereafter the surgery was performed and two growths weighing a total of sixteen pounds were removed from her uterus; and that at this time she was sixty years old and had a "little stand" in the Maxwell Street Police District.

We think that it is "improbable" that the defendant solicited prostitution as claimed by the state. People v. Sheppard, 402 Ill. 347, 352.

one of the most important factors in the development of the human mind is the environment. The environment is the sum of all the external factors that influence the individual. It includes the physical environment, the social environment, and the cultural environment. The physical environment includes the climate, the geography, and the natural resources. The social environment includes the family, the community, and the society. The cultural environment includes the customs, the traditions, and the values. The environment shapes the individual's personality, his behavior, and his destiny.

### THE ENVIRONMENT AND THE INDIVIDUAL

The environment is a complex system of factors that interact with each other and with the individual. It is a dynamic system that changes over time and space. The individual is a part of this system, and he is influenced by it. The environment shapes the individual's personality, his behavior, and his destiny. The individual, in turn, influences the environment. This is a continuous process that goes on throughout the individual's life.

The environment is a powerful force that shapes the individual. It determines the individual's opportunities and his limitations. It determines the individual's values and his beliefs. It determines the individual's behavior and his actions. The individual is a product of his environment. He is what he is because of the environment that he lives in. The environment is the most important factor in the development of the human mind.

The environment is a complex system of factors that interact with each other and with the individual. It is a dynamic system that changes over time and space. The individual is a part of this system, and he is influenced by it. The environment shapes the individual's personality, his behavior, and his destiny. The individual, in turn, influences the environment. This is a continuous process that goes on throughout the individual's life.

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For the reasons previously set out we are compelled to reverse the conviction. Inasmuch as "it does not appear that there are other witnesses available" there will be no need for remanding the cause. People v. Sheppard, 402 Ill. 347, 352; People v. Scott, 345 Ill. App. 73.

JUDGMENT REVERSED.

FEINBERG, J. CONCURS.

LEWE, P.J. TOOK NO PART.

For the purpose of this study, the following  
 data were collected: 1. The number of  
 cases of the disease in the community, 2. The  
 number of cases of the disease in the hospital,  
 and 3. The number of cases of the disease in  
 the community. The data were collected from  
 the following sources: 1. The community,  
 2. The hospital, and 3. The community.

1. The community, 2. The hospital, and 3. The community.

524 A

46829

VERONICA STARK,

Appellant,

v.

WILLIAM STARK,

Appellee,

JOHN and ISABELLE RUBIEN and  
CASIMIR GRIGLIK,

Intervenors.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

101A<sup>2d</sup>535

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order reinstating a previously "suspended" order providing for plaintiff's payment of support money to intervenors for plaintiff's three minor children.

Plaintiff and defendant were married in August 1938 and were divorced December 29, 1953. Originally, by agreement, the decree awarded the parties joint custody of their three minor children, but residence of the children was to "remain" with intervenors, plaintiff's sister and brother-in-law. The decree was subsequently modified and custody given to intervenors. March 30, 1954 plaintiff and defendant were each ordered to pay intervenors, beginning April 1, \$17.50 weekly for child support.

April 27, 1954 plaintiff filed a petition stating that due to harassment by intervenors and their attorney, rendering her nervous and ill, she was forced to give up her employment; that the order of March 30 was based on her ability to work; and that now being unemployed and with no income, she asks the support order be "suspended" until she again is employed and has an income.



We infer from the record that intervenors answered the petition and filed a counter petition for an increase in the support order and for other relief. On June 3, 1954 the increased support was denied and the original order of support "temporarily suspended as of June 1, 1954."

June 7, 1954 the intervenors filed a petition for a rule to show cause, alleging plaintiff was unemployed voluntarily and without good cause and was contemptuous. June 18 plaintiff's visitation privileges were set aside. April 20, 1955 an order found plaintiff not in contempt of court and discharged the rule to show cause.

April 21 intervenors filed a petition for <sup>an</sup> order of support. It alleged defendant paid \$17.50 weekly toward support of the children; that the average support needed weekly amounted to \$83.31; that plaintiff was responsible for one-half the support; that for nearly a year she had contributed nothing because of the suspension of the order on the grounds of illness and unemployment; on information and belief, that plaintiff is in good health and able to work but neglected to do so in order to sustain the suspension of her obligation; that, also on information and belief, defendant is unable to contribute more than the amount he does contribute; and that plaintiff should be compelled to contribute reasonably each week.

Plaintiff answered the first of five interrogatories filed on April 22 by intervenors, stating she had not consulted a physician since July 2, 1954. She did not answer when she last consulted a physician and the nature of the

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illness about which she consulted. She filed a counterpetition May 17 alleging intervenors' petition was harassment and that she was without funds. Intervenors replied to the counterpetition asking for reinstatement of the "suspended" support order. Plaintiff moved to dismiss the original petition on the grounds that there was no showing of change of circumstances; that intervenors were not proper parties; that the relief sought was unconstitutional as attempting to compel involuntary servitude; and that the reply was harassment; she also asked allowance for attorneys' fees. The motion was denied.

June 7, 1955 the chancellor "on hearing petition filed herein" ordered plaintiff to resume weekly payments of \$17.50 on June 14. This is the order from which plaintiff appeals.

Plaintiff makes the sole contention that there is no change of circumstances which could justify the modification of the order in existence when the order appealed from was entered. Intervenors argue with force that the original support order was temporarily suspended because of a finding that plaintiff was then unable to work due to illness; that the instant petition alleged she was in good health and able to work; and that the finding to that effect was a finding a change of circumstances furnishing a proper basis for the order. We agree with intervenors that the finding on April 20, 1955 in favor of plaintiff on the rule to show cause does no more than decide she was not wilful in failure to make support payments prior to June 1, 1954.



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In the absence of a report of proceedings showing the contrary we presume that there was evidence to support the implicit finding of a change of circumstances. Since the petition would support a finding of a change in plaintiff's ability to work and in view of the presumption, the conclusion follows that we cannot decide the order was improper.

We think the order should be, and is hereby, affirmed.

JUDGMENT AFFIRMED.

FEINBERG, J. CONCURS.

LEWE, P.J. TOOK NO PART.

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\* Journal of the American Statistical Association

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1. *Phragmites australis* (Cav.) Trin. ex Steud.

1. *Chlorophyll a* (Chl *a*) and *Chlorophyll b* (Chl *b*) were determined by the method of Lichtenthal and Whistler (1973). The total chlorophyll content was calculated as the sum of Chl *a* and Chl *b*.

• *Chlorophyll a* (Chl *a*) is the primary photosynthetic pigment in all photosynthetic organisms. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum. Chl *a* is the most abundant pigment in the chloroplasts of green plants and algae.

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| ALICE JONKMAN,     | } | ON LEAVE TO APPEAL |
| Appellee,          |   |                    |
| v.                 |   | FROM CIRCUIT COURT |
| GEORGE SINGLETARY, |   | COOK COUNTY        |
| Appellant.         | } |                    |

10 I.A.<sup>2d</sup> 335

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for personal injuries sustained by her when struck by an automobile while she was walking across Highway No. 6 about midblock between Cottage Grove and South Park Avenues in the Village of South Holland, Illinois. The trial judge denied defendant's motion for a directed verdict at the close of all the evidence, and the cause was submitted to the jury on the questions of negligence and contributory negligence, resulting in a general verdict of not guilty. Plaintiff's motion for a new trial was granted, and we allowed defendant's petition for leave to appeal.

The accident occurred shortly before 11:00 p.m. on Sunday, June 6, 1954. Earlier in the evening plaintiff and her husband, John Jonkman, and their son, Jacob, and his wife, Ann, visited the Couwenhovens, Ann's parents, who resided at 449 East 162nd Street, or Highway No. 6 (now known as 159th Street), in the Village of South Holland. Their home, on the south side of the highway, was between Cottage Grove Avenue, which was some 2000 feet



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east of the house, and South Park Avenue, some 500 feet to the west. At that time Highway No. 6 consisted of two concrete lanes, one for each direction of travel, and was in the process of being widened to four lanes. The second westbound lane on the north side of the highway was not yet laid, and the second eastbound lane was not yet in use. Construction of the south or second eastbound lane had begun near Chicago Road and continued east to the Couwenhoven home, where it tapered to the old concrete near the east driveway of the Couwenhoven house. On the fresh concrete to the east of the taper there were some lighted pot-flares and horses, or barricades, about a half block away. Before the road-widening construction had started, the speed limit posted about a mile east of the Couwenhoven house was thirty-five miles per hour, but due to the construction work it had been reduced to twenty-five miles per hour. The only illumination anywhere near the place of the accident was an overhanging light about 100 feet east of the Couwenhoven house. It was a warm evening, and the road was dry.

The Jonkmans arrived at the Couwenhoven residence about eight-thirty in the evening. The son parked his car on the north side of the highway, twenty-five feet west of the house, and the father parked his car just west of his son's. They had all visited the Couwenhovens on prior occasions and were familiar with the area. They left about 10:45 p.m. Plaintiff and her husband walked down the front-porch stairs to the highway, while the son waited at the foot of the stairs for his wife, who had paused to



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talk to her mother.

Plaintiff testified that when she and her husband got to the highway they walked about five to seven feet west and then stopped, looked to the east and to the west, and saw the headlights of an east-and also a westbound automobile (defendant's) which were about a block away in either direction; that after stopping and looking, they started across the highway from the south, going in a northwesterly line to reach their parked car, looking straight ahead, and that they did not again look in either direction or again see the westbound car which struck them. Plaintiff said that in crossing the highway they "hurried across" and were "walking fast"; that her husband, who had hold of her right hand, admonished her not to lag behind. She did not know how far she and her husband had crossed the highway in a northwesterly direction when they came in contact with defendant's westbound automobile.

Plaintiff's son, Jacob Jonkman, testified that after his wife finished talking to her mother and joined him at the foot of the porch stairs, they walked north toward the highway, behind his parents, who were about twenty-five feet ahead; that as they kept on walking, he saw the headlights of a westbound automobile (defendant's), which was about 400 to 500 feet to the east when he first saw it; that his parents were just approaching the highway at that time and started to walk northwest across the highway, his father holding his mother's hand; that there was nothing unusual



about the movement of the westbound car, the speed of which he was unable to estimate; that he did not know how far his parents had crossed at the time of the impact; and that after the occurrence of the accident, an eastbound car came to a stop directly in front of where his mother was lying on the pavement.

Ann Jonkman, plaintiff's daughter-in-law, stated that after she joined her husband at the foot of the porch stairs they proceeded north toward the highway; that about the time her mother-and father-in-law reached the edge of the highway she saw defendant's westbound car about 400 to 500 feet away; that she continued to look in that direction but had no opportunity to form an opinion as to the speed of the automobile, although later she estimated the speed at between forty to fifty miles per hour, or possibly less. In crossing the highway Mr. Jonkman took his wife's hand, and the two hurried across in a northwesterly direction, "walking fast...at a pretty good clip"; that at the time of impact it seemed to her as if the couple were in the center of the north lane and still walking fast.

Wendel Flint, president of the Mid-States Trailer Transport Company, was driving his automobile in an easterly direction in the eastbound lane. He testified that he had started his car from the stop light at South Park Avenue and was going twenty to twenty-five miles per hour prior to the accident; that it was very dark there (as all the witnesses agreed), and that he did not pick the people up in his headlights until they were about seventy-five to



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a hundred feet away; that it was so very dark that they appeared to be a blur, and that he could not tell if they were a man and a woman until after the accident; that it definitely looked to him as if the people were running north ahead of his automobile, and that he had to make a quick stop to avoid hitting them; that the westbound car was approximately half the length of the courtroom from the people when they ran in front of it; that there was no car in front of the westbound automobile which struck them, but that there were some cars parked on the north side of the highway; that in his opinion the westbound car which struck plaintiff and her husband was not going very fast; that the Jonkmans were a little better than half-way across the highway when they were hit; that after the accident Mrs. Jonkman was lying at the right front wheel of his car, and that Mr. Jonkman (who died as a result of the accident) was behind the left rear wheel.

Helen Kettle, who was in the front seat of Flint's car, testified that when she first saw the Jonkmans they were walking west, to the right and several car-lengths ahead of the automobile in which she was riding; that the next moment one of them seemed to clutch the other, and they made a dash across the highway, darting in front of the car in which she was riding; that it was very dark at the scene of the accident, and that the Jonkmans ran across the highway from the south to the northwest, and that defendant's car, which came in contact with them, was a little more than a car-length, or about twenty to twenty-two



feet, away from them; that the driver of the car in which she was riding jammed on his brakes and came to a stop; that the Jonkmans were a few feet past or north of the middle of the highway of the westbound lane when they were struck; that the westbound car (defendant's) was going about as fast as the car in which she was riding.

George Singletary, the defendant, testified that he was employed by the Texas Company as a gauger. He had worked until about 4:00 p.m. of the day of the accident. The Texas Company was located in Lockport, Illinois, where defendant resided. After work, he went to his home, where he remained until about 7:30 or 8:00 p.m., when he and his wife went to his mother's home, about three blocks away. Thereafter they left for the Lansing Sportman's Club. On the way they stopped for a short time to call on a friend and arrived at the club between 9:15 and 9:30 p.m., that they each had a highball at the club and left shortly after ten o'clock. Lansing is about eight to ten miles east of South Holland. Lockport is approximately forty miles east of Lansing. After leaving the club, defendant drove his 1951 Buick west on Highway No. 6 from the Calumet Expressway, which was about two miles east of the Couwenhoven house. His automobile was in good condition, and new brakes had been installed about three or four months before the accident. As he entered Highway No. 6 from the expressway there were other cars ahead of him which either turned off or pulled away; that as he approached the Couwenhoven house there was one eastbound car coming, but no westbound

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cars ahead of his automobile; that he was traveling between thirty to forty miles an hour, and that his driving lights were on; that when he first saw the Jonkmans they were in front of his car, about twenty to thirty feet away; that the accident happened so fast he could not say whether they were walking or running; that the eastbound car (Flint's) was about a hundred to a hundred and fifty feet, or half a block, away at that time; that when he saw the Jonkmans twenty to thirty feet ahead he applied his brakes hard; that plaintiff and her husband were just across the center line of the highway, or maybe three-fourths of the way across from the south side of the road at the time of impact, and there was no time to turn the skidding car in any direction. The impact took place at the left front end of his car which moved about three car-lengths after the impact; that plaintiff's husband was found lying at the left front side of his automobile, and plaintiff about three car-lengths to the rear thereof; that the eastbound car (Flint's) came to a stop alongside of or about three to five feet away from plaintiff.

Esther Singletary, defendant's wife, stated that she rode in the front seat alongside her husband; that they were not in any particular hurry and were driving at a moderate rate of speed; that prior to the impact she saw only a man, and he was running north in front of the car about three to four feet away from it; that her husband put his foot on the brakes and tried to stop. Her description



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as to where Mr. and Mrs. Jonkman were lying after the impact was approximately the same as that of other witnesses.

The abstract of record, consisting of 400 pages, embraces the testimony of other witnesses, but the foregoing is a substantial summary of the occurrence as related by eyewitnesses on both sides. There is substantially no dispute as to the salient facts, except as to the speed of defendant's automobile. However, there is nothing to indicate that the speed of defendant's car in any way proximately caused the accident. Moreover, the negligence of defendant, if any, has no bearing on the question of contributory negligence of plaintiff.

In granting the new trial, the court observed that "many errors have crept into the record on the side of both plaintiff and defendant. It is my honest belief that the verdict of the jury was against the manifest weight of the evidence. I am not passing upon the conduct of counsel." Defendant's attorney then posed the following question: "Do I understand from the remarks of the Court that that is the only ground upon which you are granting the motion for a new trial?" The court replied: "I said it was against the manifest weight of the evidence, and I am not passing upon the conduct of counsel."

Of course the party in whose favor the new trial was granted is not limited to the reasons assigned by the



trial court, but on appeal may urge any grounds upon which it relied in the trial court to sustain the order.

McNulty v. Hotel Sherman Co., 280 Ill. App. 325; Commonwealth Building Corp. v. Hirschfield, 307 Ill. App. 533. The major part of plaintiff's brief is devoted to the contention that the verdict is contrary to the manifest weight of the evidence, and that the trial court exercised sound discretion in granting a new trial. Plaintiff's counsel also argue that defendant's counsel was guilty of gross misconduct.

As to the first of these propositions, defendant takes the position that the evidence which the trial court said failed to support a verdict for defendant has been held to constitute contributory negligence as a matter of law, and that interfering with a jury verdict on the basis of evidence which warrants a directed verdict for defendant constitutes a gross abuse of discretion. We need not pass upon the question whether the trial court should have directed a verdict for defendant at the close of all the evidence. The case was submitted to the jury on the question of negligence and contributory negligence, and no complaint is made as to any instructions given or refused. It is conceded that the trial court has a broad discretion in granting a new trial; but it is not unlimited and must be reasonably exercised.

Comrs. of Lincoln Park v. Schmidt, 375 Ill. 474; Kuenazkes v. Chicago Transit Authority (Abst.), 339 Ill. App. 249. The



question of contributory negligence is primarily one for the jury to decide. The undisputed evidence indicates that the Jonkmans were attempting to cross the highway in mid-block where, as all the witnesses agree, it was unusually dark; that they were aware of automobiles approaching from both directions, whose lights they observed; that nevertheless they hurried to make the crossing and thereby they knowingly placed themselves in a dangerous position which resulted in the accident. The courts in this state have repeatedly held that a person has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution for his own safety. Doe v. City of Peru, 343 Ill. 36; Appell v. Jegen (Abst.), 348 Ill. App. 548; Ames v. Terminal R. Ass'n, 332 Ill. App. 187. Decisions of the Federal courts, as well as of other states, are to the same effect. Cox v. Kroger Co., 179 F.2d 382. In Gajewski v. Lightner, 341 Pa. 514, 19 A.2d 355, despite the negligence of defendant, the court, under similar circumstances with respect to plaintiff's contributory negligence, held that plaintiff by his own testimony had convicted himself of contributory negligence and hence was barred from recovery, and expressly pointed out that a pedestrian traversing a street not at an intersection or regular crossing is bound to exercise a higher degree of care for his own safety than would be the case were he crossing at an intersection, observing that the



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reason for the rule is apparent: ". . . he is crossing at a place where the oncoming motorist has no reason to expect him to be." It was there held that, with all doubts resolved in plaintiff's favor, he could not recover because of his own negligence.

After carefully examining the record in the case at bar, we feel that the weight of the evidence clearly supports the verdict in favor of defendant. As pointed out in the Kuenazkes decision: ". . . the questions of alleged contributory negligence of the plaintiff and negligence of the defendant were essentially questions of fact for the jury, and it was entirely within their province to determine these questions. Having determined them, the trial judge had no right to interfere with the verdict unless he could say that it was against the clear preponderance or manifest weight of the evidence. That the trial judge may have decided it differently, had it been submitted to him without a jury, does not justify him in granting a new trial. Read v. Friel, 327 Ill. App. 532, 538. The discretion that he exercises in passing upon a motion for a new trial must be a reasonable one. It must not be arbitrary. Necheles v. Jefferson Ice Co., 336 Ill. App. 153."

As further ground for affirmance it is urged that the order of the trial court is based in part on the conduct of counsel in the trial of the case. It is argued that defendant's counsel made prejudicial remarks in his closing argument with respect to the cross-examination of Wendel Flint, the driver of the eastbound car, and Helen Kettle,



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an occupant of the Flint car. Plaintiff's counsel sought to elicit from both these witnesses plaintiff's position on the roadway immediately after the accident. Because it happened so suddenly these witnesses testified that they could not tell until after the accident and after they had alighted from their<sup>own</sup> car just where plaintiff was lying. The comment of defendant's counsel was that Flint did not know whether he ran into plaintiff or up against her until he got out of the car. Objection to this comment was sustained; in his argument to the jury, however, defendant's counsel pointed out what he termed some common-sense implications of the testimony on the basis of general observation and experience in the affairs of life--that, as every driver knows, the hood and fender of a car prevent a driver from seeing a considerable area of pavement in front of and to the side of the right front wheel--and he made the following remark, to which plaintiff takes special exception: "And I say to you the law is that the jury don't have to check your brains outside, take them with you to the jury room." In the argument of cases to the jury, attorneys must be allowed to make reasonable comment upon the evidence and upon the conduct of witnesses giving their testimony. Chicago City Ry. Co. v. Creech, 207 Ill. 400.

In another instance plaintiff's counsel asked Mr. Flint whether he knew Mr. Robert Rooney of Olympia Fields Country Club, to which defendant's counsel objected. The court permitted the witness to answer, and he stated that



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there were three or four Rooneys in the club, that he did not know Robert, but did know Carl Rune, Plaintiff's counsel then asked: "You met him [Robert Rooney] in Mr. Jacobs' office?", to which the witness responded: "No, I haven't." Defendant's counsel then asked: "You mean young Bob, the lawyer?", to which plaintiff's attorney replied "Yes." Defendant's counsel then said: "He is not a member of Olympia. He is a kid starting practicing, for goodness sake!" Later in addressing the jury, defendant's counsel made the following comment: "I didn't say anything about him being at Olympia Country Club. I didn't think it was important. I didn't mention it at all. He refers to a young man in our office with four kids, supposed to be a member of Olympia Fields Country Club. Well, what would he have in common with Mr. Flint?" It is difficult to see how this could have influenced the jury.

Another objection relates to the cross-examination of Jacob Jonkman, plaintiff's son, and the comments on his testimony in the closing argument. As heretofore stated, plaintiff's husband died as a result of the accident. The first reference to testimony by Jacob Jonkman at the coroner's inquest was made by plaintiff's counsel during direct examination. Objection to this testimony was sustained, but counsel persisted in the same line of questioning, whereupon the defense moved to withdraw a juror and declare a mistrial. This motion was denied. The next time during the trial that the coroner's inquest testimony was introduced

[illegible]

into the examination of Jacob Jonkman was by way of impeachment. Defendant's counsel referred to Jonkman's purported testimony before the coroner and inquired if he had been asked certain questions and made certain answers thereto. The defense contends that these questions accomplished the purpose of impeachment, but the problem then arose as to the correctness of the testimony as transcribed by court reporters, and a long colloquy ensued between the respective counsel and the court involving a disputed question and answer. It is clear, however, that when counsel for defendant made his closing argument, the disputed question was a matter of record and was not stricken until after the motion for a new trial was decided.

There was also a dispute pertaining to the admissibility of a certified copy of a record of conviction before a police magistrate. The certified copy was referred to in plaintiff's rebuttal argument, whereupon defendant's counsel told the jury that the way to prove an official document was by introduction of a certified copy. The matter first arose during examination of the defendant under section 60, at which time he stated that he did not plead guilty when he appeared on Saturday morning, June 12, 1954, before the police magistrate of South Holland. Defendant offered to prove this contention, but the offer was denied. Nevertheless, plaintiff's counsel, in the presence of the jury, waved a purported certified copy but did not introduce it in evidence to prove the proposition which he had put forward

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry must be clearly documented, including the date, amount, and purpose of the transaction. This ensures transparency and allows for easy verification of the data.

2. The second part of the document outlines the procedures for handling discrepancies. It states that any difference between the recorded amounts and the actual amounts must be investigated immediately. The responsible party should identify the source of the error and take steps to correct it, ensuring that the records remain accurate.

3. The third part of the document describes the process for reconciling accounts. It requires that all accounts be reconciled at the end of each month. This involves comparing the internal records with the bank statements to ensure that they match. Any differences should be noted and explained.

4. The fourth part of the document discusses the importance of regular audits. It states that an independent audit should be conducted annually to verify the accuracy of the financial records. This helps to identify any potential issues and ensures that the organization is in compliance with all relevant regulations.

5. The fifth part of the document outlines the requirements for the financial statements. It specifies that the statements must be prepared in accordance with the generally accepted accounting principles (GAAP). This includes providing a clear and concise summary of the organization's financial performance over a specific period.

6. The sixth part of the document discusses the importance of maintaining proper documentation. It states that all financial records should be kept in a secure and accessible location. This ensures that the information is available when needed and can be used for future reference.

7. The seventh part of the document outlines the responsibilities of the financial management team. It states that the team is responsible for ensuring that all financial transactions are properly recorded and that the financial statements are accurate and reliable.

8. The eighth part of the document discusses the importance of communication. It states that the financial management team should maintain open communication with all stakeholders, including management, employees, and external auditors. This helps to ensure that everyone is aware of the financial situation and can make informed decisions.

9. The ninth part of the document outlines the consequences of non-compliance. It states that any failure to follow the procedures outlined in the document may result in disciplinary action. This includes fines, suspension, or termination, depending on the severity of the violation.

10. The tenth part of the document discusses the importance of ongoing training. It states that all employees involved in financial management should receive regular training to stay up-to-date on the latest accounting practices and regulations.

since, in his view, "it would be improper for plaintiff's counsel to introduce in evidence the records of the conviction." Defendant's counsel pertinently inquires: "If counsel for plaintiff really thought the so-called certified copy was inadmissible why then did he wave an inadmissible document in the presence of the jury . . .?" Viewing the trial as a whole, however, we think there is no merit to the charge that this incident constituted such improper conduct as to unduly influence the jury.

As heretofore pointed out, the trial judge expressly refrained from commenting on any of the charges of improper conduct. Obviously the real ground for allowing the motion for a new trial was that in the court's opinion the verdict was against the manifest weight of the evidence. The court observed: "This has been a bitterly fought case. Many errors have crept into the record on the side of both plaintiff and defendant." We are satisfied, however, that on the whole the case was fairly tried, and that the verdict of the jury reflects the evidence as to the salient facts which are substantially undisputed. Accordingly, the order granting a new trial is reversed, and the cause remanded with directions to proceed in due course.

ORDER REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

BURKE and NIEMEYER, JJ., CONCUR.



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46813

In the Matter of the Petition of  
JOSEPHINE KOLLMAN and the Cross-  
Petition of ROBERT A. McNELL and  
HELEN CHALMERS McNELL to adopt  
MICHAEL CHALMERS KOLLMAN

JOSEPHINE KOLLMAN,  
Appellant,

v.

ROBERT A. McNELL and HELEN CHALMERS  
McNELL,  
Appellees,

MICHAEL CHALMERS KOLLMAN,  
Appellee.

101A<sup>21</sup>336

APPEAL FROM

COUNTY COURT

COOK COUNTY

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Josephine Kollman filed a petition in the County Court for adoption of her stepson Michael Chalmers Kollman, eight years old. A cross-petition was filed by the child's maternal aunt Helen Chalmers McNell and her husband Robert A. McNell, also seeking to adopt the child. Pursuant to hearing, the court entered a decree finding that the best interests of the child would be served by giving him in adoption to cross-petitioners and ordered petitioner to surrender custody to them. Petitioner appeals from the decree and the custody order.

From evidence adduced upon the hearing it appears that Michael Chalmers Kollman is the son and only child of Leo and Ada Chalmers Kollman, both now deceased. Ada Chalmers, the older of two daughters, was born on December 9, 1904 in Hastings, Nebraska to John and Ginny Chalmers, whose families had lived in this country for several

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generations. When Ada was about eight years old the family moved to Oskaloosa, Iowa, where Ada lived until she was graduated from high school at the age of sixteen. She then came to Chicago, Illinois, where she attended the Columbia School for Expression for a year or two, and then transferred to a normal school from which she was graduated with a major in physical education. She pursued a teaching career in Muscatine, Iowa.

Leo Kollman, of German ancestry, was a carpenter and contractor in Muscatine, Iowa, when he met Ada Chalmers. They were married in 1929 and came to Chicago to live. After their marriage they both worked; in addition Leo Kollman attended an electrical school, and subsequently secured a position with the Liquid Carbonic Company. Ada Chalmers Kollman died in childbirth in June of 1947. In October of that year Leo Kollman first met Josephine Kostalek, the petitioner herein, and about six months later they were married, she for the first time. Josephine Kostalek was born in 1903 in Budapest, Hungary, of Czechoslovakian parents. After her family came to this country her father and mother both found employment, her father as a laborer and her mother as a cook. Josephine completed the seventh grade and then secured employment in the Stock Yards for two years. From there she went to work for the Western Electric Company, first as an adjuster of teletype relays and then as an instructor in that type of work. She remained with Western Electric for about two years after her marriage, at which time she had completed thirty years with the company, and



remained home for a year on sick leave, granted to her because of migraine headaches and bursistis in her arm and shoulder; in October 1951 she was given a disability pension.

Michael Chalmers Kollman, the subject of this proceeding, was born June 24, 1947, some eighteen years after the marriage of his parents; two days after his birth his mother died. Helen McNell, Ada's married sister, who lived in the East, immediately came to Chicago, and offered to take Michael into her home, but Leo felt that since Helen lived so far away he would not be able to see his son very often, and decided instead to send Michael to live with his (Leo's) sister, Mrs. Merle Young, in Rock Island, Illinois. Michael stayed with her until October 1951, when Josephine and Leo Kollman took him into their home. At about that same time Judy Hansen, a granddaughter of Josephine Kollman's sister and a grandniece of Mrs. Kollman, came to live at the Kollman home. The girl's mother had been committed to Manteno State Hospital; Judy has continued to reside at the Kollman home. In July 1954 the Kollmans moved into a five-room house at 8741 South Utica Avenue, Evergreen Park, Illinois, which adjoins Chicago on the far southwest side. The house has only two bedrooms, one of which Judy and Michael shared--an arrangement that was to continue until Judy entered college, as she contemplated doing, in January 1956. Leo Kollman died suddenly of a heart attack on February 17, 1955. Michael was extremely fond of his father and very much attached to him. Mrs. Kollman's income consists of a Western Electric disability pension of \$76.00 per month,



dividends from stock aggregating about \$356.00 per year, or about \$30.00 per month, and social security payments of \$147.80 per month--half Michael's and half hers for taking care of him; if she loses his custody permanently the social security payments will be discontinued. It was Mrs. Kollman's plan to work part-time when Michael went to school. She was not employed at the time of the trial and had not been since Leo Kollman's death. She still suffers from time to time with migraine headaches which confine her to bed, and attacks of bursitis of some two weeks' duration which prevent her from using her arm. On March 9, 1955 Mrs. Kollman filed an adoption petition, with the written consent of Laura Kollman McKeone, a paternal aunt of Michael.

Although the Kollmans and the McNells had kept up their contacts through the years, even to the extent of visiting at each other's homes, Helen McNell first learned of Mrs. Kollman's adoption proceeding through the local welfare board in Darien, Connecticut. Thereafter, on May 10, 1955, Helen and Robert McNell filed their appearance in court, and on May 18, 1955 their answer and counter-petition for adoption, with the written consent of John Chalmers, Michael's maternal grandfather. Helen Chalmers McNell and Robert A. McNell, cross-petitioners, are Michael's aunt and uncle. Helen Chalmers McNell is the sister of Ada Chalmers Kollman. She also was born in Hastings, Nebraska, on February 14, 1911, and was about a



year old when her family moved to Oskaloosa, Iowa. She was graduated from high school in Oskaloosa in 1928 and, like her sister, came to Chicago following her graduation. Her sister Ada came to the city with her to help her get established, and within a year Ada Kollman, with her husband, established residence in Chicago. Helen Chalmers obtained employment with the Baldwin Piano Company and also a bond house. A short while after coming to Chicago she attended De Paul University Drama School for about two and a half years. While she lived in Chicago she and the Kollmans saw a great deal of each other. In 1937, however, Helen Chalmers went to New York, where she met Robert A. McNell. She was married to him at her family's residence in Oskaloosa; Ada and Leo Kollman were the matron of honor and best man at the ceremony.

Robert A. McNell was born in Jersey City, New Jersey. He was educated there in the elementary schools, then went on to the Brooklyn College Preparatory School, a Jesuit institution, and took his college work at the University of Alabama, from which he was graduated. Following his graduation he entered the advertising field, in which he has held increasingly responsible positions, and is now president of the Thompson-Koch Company, Inc., the advertising subsidiary of the Sterling Drug Company. His annual salary is \$20,000.00, and he has been receiving a year-end bonus of \$3000.00. He carries life insurance in the amount of \$55,000.00, has a bank account of approximately \$5000.00, and has accumulated government bonds which



he has earmarked for his children's education.

Mr. and Mrs. John Chalmers, Mrs. McNell's parents and Michael's only living grandparents, came to Darien in 1952 and live in a garage apartment on the McNell property. Mr. McNell contributes to their support.

The McNells have three children: a son, Barry, born in 1940, and two daughters, Bonnie, born in 1944, and Kate, born in 1949. They are all in excellent health and attend the Darien public schools, where they are getting along nicely. Barry made the freshmen football team, has been going out for hockey, and is an expert ice skater. The children have been given private lessons in music, horseback riding and baton twirling. They have a dog, as well as other pets.

The McNells established residence in Darien, Connecticut a few years after they were married, and have continued to live there. It is within commuting distance of New York City, where Dr. McNell's office is located. In Darien they have a ten-room house, with seven bedrooms and three bathrooms, located on two acres of rolling land with a frontage on an inlet of Long Island Sound. Real estate appraisers have told Mr. McNell that, with the improvements he has made, his property has a value of at least \$50,000.00, as against the \$18,000.00 he paid for it. Because of their proximity to the Sound, the McNells are very interested in water activities. They have several small boats as well as a twenty-eight foot sailboat on which they cruise; all the children are being instructed in handling the boats. In

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom. The second is the fact that the majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom. The third is the fact that the majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom.

addition to water sports, Darien has excellent recreational facilities generally--golf, tennis, skating, etc.

The McNell home is in a residential area, and many of the families there have children. The McNells themselves are actively interested in community <sup>affairs:</sup> ~~activities~~ Mrs. McNell does disaster work for the American Red Cross, and is a member of the Parent Teacher Association, in which she held office for two years; Mr. McNell is presently on the executive committee of the Sea Scouts, and is flag lieutenant of the United States Power Squadron (an organization designed to educate people on the rules of seamanship relating to boating and navigation).

By an interesting coincidence Ada and Helen Chalmers, both Presbyterians, married Catholics, and the children of both marriages are being brought up as Catholics.

It is well-settled law that in awarding custody the best interests and welfare of the child must take precedence over all other considerations. Buehler v. Buehler, 373 Ill. 626, Nye v. Nye, 411 Ill. 408; In re Petition of Dickholtz, 341 Ill. App. 400. In resolving the problem presented in a contested adoption proceeding a comprehensive comparison must be made of all the relevant facts respecting the parties seeking to adopt the child. No single factor can be determinative; rather, the decision must be reached in the light of the entire picture as it is developed from all the pertinent details. It is a problem whose solution taxed the wisdom of a Solomon; it encompasses much more than can be weighed



in the scales of justice, for it transcends justice and seeks to anticipate what will best serve the needs of a child. It involves estimating intangibles, evaluating human beings. Prospective adoptive parents must be considered in all the facets of their personality, in all the situations of their relationship with the child. The court must take into consideration their age, heredity, family history and background, education, health, experience in raising children, income, type of home, environment, neighborhood, opportunities and advantages to be offered to the child.

The gravamen of petitioner's argument is that the findings in the decree are not supported by the facts; that the court abused his discretion in making his decision. Petitioner argues that too much stress was placed upon the financial differences in the incomes of the contesting parties; that blood relationship should not necessarily entitle one to adopt a child; and that petitioner's widowhood should not preclude her from being awarded custody.

It is conceded that all the contesting parties are fit persons and of good character. The facts heretofore recited are substantially undisputed, and it seems to us that a reading thereof justifies the court's decision. Mrs. Kollman is a widow in her early fifties. She is afflicted with chronic migraine headaches and bursitis, ailments which will handicap her in maintaining a home or finding new employment. She was first married at the age



of forty-five, has never had a child of her own or (except for the few years Michael lived with her) any experience in raising children. There are apparently no male members of her family who could give Michael the supervision, training and companionship of a mature man, no one with a male point of view to interest him in a boy's activities; he would grow up in a feminine world. Nor is there any evidence to suggest that Michael would be given extracurricular education or social opportunities.

On the other hand, the McNell home offers Michael unusual opportunities and advantages. There he can become a member of a complete, active, healthy and happy family, in a wholesome environment, with the companionship of other children. While it is true that the financial interests only of a child cannot be the determining factor in an adoption proceeding, the financial circumstances of the prospective adoptive parents must be considered; it is a statutory requirement (section 4--1, paragraph 5 of the Adoption Act, Ill. Rev. Stat. 1955, ch. 4) that the petitioner be "of sufficient ability to bring up the child and furnish suitable nurture and education of the child." Robert McNell's circumstances fully comply with this requirement, and the court so found in the decree. So far as the financial circumstances of the parties enter into the award, there is no probability that Mrs. Kollman's income will increase substantially in the future, whereas Mr. McNell is a rising, comparatively young, executive in a growing field, and it is reasonable to expect that



his income will increase.

Although a blood relationship cannot be the sole criterion in an adoption proceeding, it should be considered by the court; and as the court said: "A blood relative is closer than a stepmother." Family ties have always been strong with Mrs. McNell. Her sister Ada came with her to Chicago to help her get settled in 1928. During the eight years that Ada and Helen were living in Chicago--1929-1937--they saw a great deal of each other and were very close. In 1939 Helen Chalmers traveled from New York to Oskaloosa to be married to Robert McNell in her family's home, and Ada was her matron<sup>of</sup>/honor. Thereafter Mrs. McNell took her children, at various times, from New York or Darien to visit her parents in Oskaloosa, and stopped in Chicago en route to see Ada. Since 1952 Mrs. McNell's parents have been living with the McNells. Moreover, Mrs. McNell's interest in Michael has been evidenced ever since his birth when she sought to take him into her home, immediately following his mother's death, as well as by her continuing relationship with the Kollman family. Mr. McNell had occasionally visited the Kollmans on week-ends when he was in Chicago on business, but did not see Michael on those occasions since the boy was then still living with his aunt in Rock Island. The Kollmans spent close to a week with the McNells in Darien in the summer of 1954. She testified that she wants to adopt Michael because he is her only sister's only child, and that he will be given the same advantages as her own children.

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*Journal of Management Studies*, 19(1), 67-80.

*Journal of Interpersonal Violence* 26(10) 1987-2000

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The trial court definitely had in mind the need of a father for a young boy. Petitioner points out that there is no evidence on this issue, and argues that "the theories of psychiatrists, psychologists and sociologists on a question such as this vary with the individual expert. What was the accepted theory of experts in these fields only a few years ago has been completely discarded. A trial court in the exercise of its judicial discretion in determining the best home for a child may be compelled to accept one theory or another. In such a case, the trial court should at least hear the testimony of such expert witnesses and give opposing counsel opportunity to cross-examine them." It is a matter of common knowledge that accredited child-caring agencies, in giving children in adoption, place great emphasis upon a complete family unit, and are extremely reluctant to place a child in the home of a widow where there is a satisfactory alternative. The importance to a boy of the companionship, guidance, example and discipline of a father is universally recognized. No testimony of expert witnesses is necessary to inform the court of a matter of common knowledge. This principle was recognized in People v. Weeks, 228 Ill. App. 262, where there was a controversy involving a twelve-year old girl whose custody was sought by both her father, and her aunt with whom the girl had been living for about ten years. Under the circumstances of that case, including a pronounced preference of the child for her aunt, the court



left the girl with the aunt, but commented: "If the object of the petition were a boy, it might well be that under such circumstances he should be given to the father, who could perhaps better give him the more rigorous training and tuition necessary to his proper bringing up." If Michael should be given in adoption to Mrs. Kollman he would be a fatherless child; and there is no evidence of any male relative of Michael or Mrs. Kollman in the Chicago area who has any interest in him. The only local relatives mentioned by the witnesses are Leo Kollman's three sisters, Mrs. Kollman's sister and her daughter, who is Mrs. Kollman's niece. As heretofore stated, he would be living in an entirely feminine world, and this is not in the best interest of a boy who is approaching his adolescent period.

The adoption decree finds the factual situation that cross-petitioners and the child are closely related and have known each other since his birth, <sup>and</sup> that the child is now an orphan with no one legally entitled to his custody, constitutes good cause to waive the requirement of the statute that the child shall have resided in the home of the prospective adoptive parents at least six months preceding the filing of the petition. Section 3--2 of the Adoption Act expressly authorizes the court in its discretion to waive the residence requirement for good cause shown of record. The six-month probationary period for testing the welfare



of a child in his prospective new home is of course eminently appropriate in the adoption of a child by strangers, but in the instant case it is clearly unnecessary for the child's welfare, where the adoption is by close relatives who know the child. Although the Illinois Act does not expressly authorize a waiver of requirement in any case of close relationship, other states--Iowa and Pennsylvania to mention two--have expressly authorized a waiver in such situation. The Illinois act leaves a waiver of the residence requirement to the court's discretion under all circumstances, and we think that under the circumstances of this case it was a sound exercise of discretion.

Petitioner discusses section 4--2 of the Adoption Act which provides that the court in entering a decree shall, whenever possible, give custody through adoption to petitioner or petitioners of the same religious belief as that of the child. This provision is fully satisfied in the instant proceeding. Robert McNell and his children are practising Catholics. Mrs. McNell testified that Michael would be brought up as a Catholic, just as are the McNell children. Although Mrs. McNell is of the Presbyterian faith, Michael's own mother was also Presbyterian, and the religious professions of Michael's adoptive parents exactly parallel those of Michael's own parents.

There remain for consideration two further reasons advanced by petitioner for reversal of the decree. It is



first urged that the trial court erred in considering the report of the Cook County Department of Public Welfare. Section 3--1 of the Illinois Adoption Act makes an investigation and report mandatory. The investigation was made pursuant to a prayer in the original petition (such a prayer was likewise included in the cross-petition), and an order was entered on petitioner's motion of March 9, 1955, the date the petition was filed. The report of the trial proceedings shows that at the beginning of the hearing and before the introduction of any evidence the trial judge read the report of the Department of Public Welfare. The report of proceedings contains no other reference to it. At no time did any party object to or question the court's reading of the report. None of the counsel asked to see it or was denied an opportunity to do so. None of them asked that the investigators be produced in court as witnesses, nor does the trial court's opinion contain any mention of the report. Since the Adoption Act makes the investigation and report mandatory, it must be assumed that the court was intended by the statute to examine and consider it; the legislature would hardly require a useless investigation. The statute provides that no "facts therein set forth [may] be considered in the hearing of the cause unless established by competent evidence." The support of competent evidence is in effect a safeguard, a qualification, required in a consideration of the report. Only those facts which are



established by competent evidence may be considered by the court at the hearing; such a limitation prevents a court from resting its decision primarily or entirely upon such a report. Section 3--1 appeared for the first time in the Adoption Act of 1945; it is in accord with current prevailing practice throughout the United States. An article in the Yale Law Journal (vol. 59, p. 715, March 1950) discusses at some length present adoption practices and highly approves the investigation and evaluation of prospective adoptive parents by authorized agencies (such as a public welfare agency) in advance of adoption decrees. It points out that at that time thirty-five states and the District of Columbia made a social investigation mandatory, while six other states provided that it might be made in the discretion of the court. Moreover, it has been uniform practice in Cook County since 1945 to require these investigations and reports in all adoption cases in accordance with the statute, and a reviewing court should certainly hesitate to cast doubt on the validity of the thousands of adoption decrees which have been entered during the past eleven years. It is evident from the findings in the decree here under consideration that the court based his decision on the evidence adduced upon the hearing, with full opportunity to examine and cross-examine all witnesses, and that he accorded the report only the weight allowed it by statute; the findings in the decree are fully supported by the record.



Since oral argument counsel for petitioner filed supplemental suggestions, citing Williams v. Williams, 8 Ill. App. 2d 1, a divorce proceeding in which the custody of a child was involved. An investigation was made without any statutory direction and on the court's own volition. From all that appears of record, the decision of the chancellor, in modifying the divorce decree giving custody of a minor to its mother, was made solely on the basis of the so-called "confidential report," without any evidence in the record to support it, or any opportunity to examine or cross-examine the persons who had made the report. Under the circumstances the decree was reversed as contravening "the American ideal of due process of law,"

Lastly, it is urged that the court erred in interviewing Michael in chambers, off the record, although such procedure was suggested by counsel for petitioner and somewhat reluctantly approved by opposing counsel. Of course the agreement of counsel could not be binding as to the interests of the minor which are the paramount question in an adoption proceeding. Cohn v. Scott, 231 Ill. 556. As was said in that case: "If the chancellor could decide partly on investigation made out of court, then the whole decision might rest upon such an investigation and could not be reviewed. Such is not the law." In the instant proceeding, the interview was held at the instance of the repeated request of petitioner's counsel, first at the close of her case, and again at the close of



all the evidence. Cross-petitioners at first objected to the interview, but after the court stated<sup>that</sup> he would take into consideration the present circumstances of the child, that the interview would probably have no particular influence on the court, and that he would prefer not to have the child testify as a witness, counsel for cross-petitioners withdrew their objection. Petitioner's urgent request for the interview in the trial court, and her subsequent objection to it on appeal, give rise to the inference that she anticipated an advantage from her exclusive custody which was not realized. In view of the statement of the trial court before the interview and the fact that the decree, as we view it, is clearly in accord with the manifest weight of the evidence, there is no reason to suppose that the court over-weighted the information he secured in the interview. In Cohn v. Scott, cited by petitioner, a divorced mother filed a petition for modification of the divorce decree asking custody of the child a portion of the time. There is no indication that the child was interviewed by the chancellor. The remarks of the court quoted hereinbefore were evidently directed to an investigation of the mother's fitness. In Buehler v. Buehler, (already cited), a divorce proceeding, the Supreme Court recognized the desirability of ascertaining a child's preference in a custody case. In any case it has a bearing, and in some instances the interview of a child whose custody or adoption is in question may



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be a safe guide for ascertaining the child's best interests or wishes, and cannot harm its interests; where the decree is amply supported by the weight of the evidence in the record, such an interview, conducted with the consent of all parties, should not be considered error.

The decision in this case required a comparison of the petitioner and cross-petitioners. The trial court, from the evidence adduced upon the hearing and from his personal observation, had the best opportunity to evaluate the parties as adoptive parents and to make the comparison between them. We think the decision was clearly proper and supported by the manifest weight of the evidence. The decree and order of the County Court is therefore affirmed.

DECREE AND ORDER AFFIRMED.

BURKE AND NIEMEYER, JJ., CONCUR.





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There is no corroboration of this testimony. Defendant specifically denied each act of violence and testified to acts of cruelty by plaintiff on the dates named in the counterclaim and at several other times. Three friends testified to seeing defendant on February 12, 1954, or a day or two thereafter, and that she had a bruise on her leg and her face was swollen. A physiotherapist, who treated defendant, corroborated the testimony of these three witnesses. There is testimony as to the low earnings of plaintiff, the earnings of defendant--almost twice the amount earned by plaintiff, her income from stocks and the ownership of the apartment in which the parties lived. Defendant testified that she spent \$30,000 on their living, from their marriage (December 31, 1951) to their separation (February 24, 1954). There is no claim that she is now without assets other than her earnings.

Plaintiff entered his appearance in this court but did not file a brief. Defendant contends that the verdicts of the jury finding the issues on the complaint and counterclaim for plaintiff, and like findings by the court in the decree, are against the manifest weight of the evidence. She relies solely on Coolidge v. Coolidge, 4 Ill. App.2d 205, decided by this court. In that case we held that a decree of divorce on the grounds of cruelty could not be sustained on the uncorroborated testimony of the plaintiff where, as here, the charge is denied by the defendant. The part of the decree granting the divorce to plaintiff is reversed.



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The verdict of the jury on the issues raised by the counterclaim is advisory only. However, the trial court, who saw and heard the witnesses, has approved the verdict. The testimony of the parties is in direct conflict, and, while defendant is corroborated by the testimony of her witnesses as to her appearance on and after February 12, 1954, this testimony tells nothing as to who was the aggressor in the altercation which both parties admit occurred on that date. We cannot substitute our judgment as to the veracity of the witnesses for that of the court and jury. Moreover, on the record before us it is extremely doubtful that the payment of any sum for separate maintenance of the defendant could be ordered, since her earnings and financial worth are so much greater than those of plaintiff. Decker v. Decker, 279 Ill. 300.

Present counsel for defendant insists that serious error was committed in sending the pleadings to the jury. This was done by agreement of defendant's counsel on the trial and cannot be urged as error.

The decree of divorce is reversed and the part of the decree dismissing the counterclaim for want of equity is affirmed.

AFFIRMED IN PART AND REVERSED  
IN PART.

FRIEND, P. J., and BURKE, J., CONCUR.



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IN THE MATTER OF THE PETITION  
OF JULIAN LEVEY and LOIS EARLIX  
LEVEY to adopt Jerome Silver  
Lee,  
  
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JULIAN LEVEY and LOIS EARLIX  
LEVEY,  
  
Appellants,  
  
v.  
  
BERTRAM Z. LEE,  
  
Appellee.

APPEAL FROM  
  
COUNTY COURT,  
  
COOK COUNTY.

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

On September 24, 1949, Lois Earlix and Bertram Z. Lee were married. A boy, Jerome Silver Lee, was born to the parties on May 16, 1950. A decree dissolving the marriage and awarding the custody of the boy to the mother was entered in the Superior Court of Cook County on May 29, 1951. Thereafter the mother married Julian Levey.

On July 20, 1954, the mother and her husband filed a petition in the County Court of Cook County to adopt Jerome. The petition states that he is in their custody and has resided with them for a period of six consecutive months; that the father abandoned and deserted the child on May 16, 1950; that he has not assisted in the support and maintenance of the child for more than four years; that he is unfit to have the care and custody of the child; and that petitioners are reputable persons of good moral character with sufficient ability and financial means to rear, nurture and educate the child in a suitable

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the 1990s, the number of people in the world who are under 15 years of age is expected to increase from 1.1 billion to 1.5 billion. The number of people aged 65 and over is expected to increase from 250 million to 450 million. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion.

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

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1. *Phragmites* (common reed) is a tall, grass-like plant that grows in wetlands and along waterways. It is a native species and is often found in large, dense stands.

1. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as  $t \rightarrow \infty$ . It is shown that the solutions of the system (1) are bounded and tend to zero as  $t \rightarrow \infty$  if the matrix  $A$  is stable. The second part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as  $t \rightarrow \infty$  if the matrix  $A$  is not stable. It is shown that the solutions of the system (1) are unbounded and tend to infinity as  $t \rightarrow \infty$  if the matrix  $A$  is not stable.

1. The first part of the paper is devoted to the study of the
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manner. Petitioners named the child and his father as parties defendant and asked the court to appoint a guardian ad litem to represent the interests of the minor, to appoint some suitable agency or person to investigate the matter and report the results thereof to the court, and to adopt the boy as their own and change his name to Jack Silver Levey. In an answer the father denied that he deserted his son and denied that he is unfit to have the care and custody of the boy. He admitted that the mother is a person of good moral character with sufficient ability and financial means to rear, nurture and educate the child in a suitable and proper manner, and stated that he had no knowledge sufficient to form a belief as to the allegations concerning the fitness of Mr. Levey.

Following a trial the court denied the petition to adopt Jerome. Petitioners moved to vacate the order on the ground that no guardian ad litem had been appointed to represent the minor and on the further ground that there was no compliance with the provision of the statute requiring an investigation and that the result of the investigation, in writing, be presented to the court on or before the return day. The court denied the motion to vacate. Petitioners appeal.

The final order recites that the court heard testimony and was fully advised in the premises. As the order is presumed to be correct and as appellants have not brought to us a report of the proceedings containing



a transcript of the testimony, they have not sustained the burden imposed on them of pointing out errors committed by the court. In such a situation we presume that the evidence supports the order. In re Estate of Murray, 310 Ill. App. 121, 124.

The record does not show whether a summons was served on the minor nor does the record show that the attention of the court was called to any failure to appoint a guardian ad litem. In McConnell v. McConnell, 345 Ill. 70, it was contended that the adoption was void for the reason that no guardian ad litem was appointed for the child. The court said that the law makes the parents the natural guardians or custodians of their child and that the record contained no error requiring reversal. Both parents of Jerome Silver Lee are alive and both participated in the adoption proceedings.

Petitioners urge as a ground for reversal the failure of the court to require that a licensed child welfare agency, probation officer or some other suitable agency or person investigate and report in writing on the allegations of the petition, the character, reputation and general standing in the community of the petitioners, whether they are proper persons to adopt the child and whether the child is a proper subject of adoption. It will be observed that the statute also provides that in no event shall any such report be filed or become a part of the record of the case, nor shall any facts therein set forth be considered



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in the hearing of the cause unless established by competent evidence. The requirement for the report is not jurisdictional. Petitioners are in no position to complain about the lack of a report because they went to trial without insisting that there be a report.

For the reasons stated the order of the County Court of Cook County is affirmed.

ORDER AFFIRMED.

Friend, P. J., and Niemeyer, J., concur.



Abstract

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STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT.

10 I.A. 338<sup>2d</sup>

May Term, A. D. 1956.

General No. 10047

Agenda No. 6

George Totsch,

Plaintiff-Appellee,

vs.

Roy E. Johnson and Lileen Johnson,

Defendants-Appellants.

Appeal from  
Circuit Court of  
Pike County.

REYNOLDS, J.

On October 15, 1953, the plaintiff-appellee George Totsch filed a suit against the defendants-appellants Roy E. Johnson and Lileen Johnson in the Circuit Court of Pike County, Illinois. Suit was based on a promissory note of the defendants to the plaintiff in the amount of \$2500. Judgment by confession was entered on October 16, 1953, and execution was awarded. Motion to open the judgment and to quash execution was filed by the defendants on October 31, 1953, at which time a jury trial was demanded by the defendants. On April 26, 1954, the defendants filed counterclaim against the plaintiff, in said counterclaim

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asking alternatively that if the defendants were required to pay to the plaintiff the amount of the note sued upon, with interest and costs, that they should be declared to have an equitable interest in an equivalent amount in the real estate involved in the suit. The plaintiff filed an answer to the counterclaim of the defendants on November 22, 1954. The Circuit Court on April 5, 1955, entered its judgment order and decree finding the issues of the cause in favor of the plaintiff in the original suit, and the issues in favor of the plaintiff and cross-defendant in the counterclaim. The court in its decree found that the note sued upon was supported by valid consideration; that no fraud had been proven in the execution of the note; that conversations between the parties before the signing and delivery of the note were immaterial; that the parties themselves construed the instrument entitled a "lease" as a contract for sale of the real estate involved and that it was so construed by the court; that the defendants were not entitled to any equitable interest in the real estate or any equitable relief. From that decree the defendants have appealed to this court.

The suit grows out of an instrument executed between the parties May 9th, 1951, which was designated "Lease", which said in part as follows: "And whereas, the said George Totsch is desiring to lease said real estate to



Roy E. Johnson and Eileen Johnson. Therefore, for the consideration hereinafter expressed, the said George Totsch hereby leases said described real estate unto the said Roy E. Johnson and Eileen Johnson under the following terms and conditions: that is to say, the said Roy E. Johnson and Eileen Johnson agrees to pay for the lease and use of said premises the total sum of \$12,000.00 as follows, the sum of \$2500.00 in the form of a certain note, said sum constituting a down payment; and also the further sum of \$9500.00 in equal instalments of \$65.00 each, the first instalment of which is due and payable on the 1st day of June, 1951, and an equal instalment is due and payable on the 1st day of each and every month thereafter until the said rent is fully paid, or by agreement of the parties this lease is terminated."

Then followed provisions that the Johnsons would keep the premises painted and in good repairs at all times; that they would allow no liens for labor or materials to attach to said property, and for the payment of the insurance premiums.

Then the instrument recites that when the Johnsons had paid the balance of \$9500.00 and all insurance and interest, together with special assessments against said property, that the owner George Totsch would deliver unto the Johnsons a good and sufficient deed of conveyance.



The instrument further recited that the contract should be treated as a lease until all the above conditions had been complied with on the part of the Johnsons, and that in case of default of any of the conditions they would surrender peaceable possession of the premises within ten days after written demand for possession.

The evidence shows that the defendants occupied the premises until December 1953, when Roy E. Johnson, a truck driver was transferred by his employer company to another city. During this time, the Johnsons had paid the \$65.00 per month as specified in the agreement, and also some 13 payments of \$20.00 each to be applied on the note and had also expended about \$2000.00 in improving the property.

The appeal raises these questions: 1. Was there a valid consideration for the note? 2. Was the instrument a lease or a contract for sale of real estate? 3. Was a forfeiture authorized? 4. Should the proffered evidence as to the purpose of the note have been admitted and should evidence of similar transactions have been admitted? 5. In the event that the defendants are required to pay the note, were they entitled to an equivalent equitable interest in the property? The answer to all these points lies in the determination of the character of the written contract itself. If the instrument was in actuality a



contract for the sale of real estate, entered into by the parties without fraud on the part of anyone, then there was a valid consideration, a forfeiture was authorized, and the defendants would not be entitled to an equitable interest for the money paid.

While the contract itself is entitled "Lease" and the word "lease" is used in the body of the contract, for all practical purposes it was a contract for sale. The note for \$2500.00 was the down payment. The \$65.00 monthly payments were payments on the balance of \$2500.00. There can be little doubt, that if the Johnsons had remained in possession of the premises, had complied with the terms of the contract, that upon the full payment, they would have been entitled to a deed for the premises. If the contract is a biguous, it is a familiar rule that the construction which the parties have placed upon it by their conduct will be adopted by the courts in the event of litigation concerning it, if that construction is reasonable. People v. Murphy, 119 Ill. 159; Burgess v. Badger, 124 Ill. 288; Barroll v. Drury, 170 Ill. 571; W. H. Purcell Co. v. Page, 200 Ill. 342; Consolidated Coal Co. of St. Louis v. Jones & Adams Co., 232 Ill. 326; McLean County Coal Co. v. City of Bloomington, 234 Ill. 90; D. M. Goodwillie Co. v. Commonwealth Electric Co., 241 Ill. 42; Barritt v. Steidinger, 196 Ill. App. 229.

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As was said in the case of Goodwillie Co. v. Commonwealth Co., 241 Ill. 42, at page 73: "If there is any ambiguity as to the meaning of this contract, the practical construction placed thereon by <sup>the</sup> acts of the parties can be resorted to to determine the meaning of the grant."

In the case of McLean Coal Co. v. Bloomington, 234 Ill. 90, the court there said: "When the terms of a written agreement are in any respect uncertain or doubtful and the persons by their own conduct have placed a construction upon them which is reasonable, such construction will be adopted by the court, \*\*\* "

Applying the rule as laid down by these cases as a yardstick for this case, it is apparent that the parties themselves, regarded the instrument as a contract for the sale of real estate. The down payment of \$2500.00 was evidenced by the note. On that note the defendants paid 13 payments of \$20.00 each. They improved the property by the expenditure of their own funds in the approximate amount of \$2000.00. They paid, as long as they intended to stay in the property, the \$65.00 per month instalments. If Mr. Johnson's employer had not transferred him from Pittsfield, he and his wife would have probably paid off the balance and demanded a deed. Although the instrument is designated a lease and the word "lease" is used therein,



every act of the parties shows that they treated it as a contract for sale. There is nothing in the evidence to show that the defendants in any way treated the agreement as a lease. Their paying out of their own money approximately \$2000.00 in improvements negatives that position. This court must hold that the contract was a contract for the sale of real estate and was not a lease. Based on that holding, the execution of the note as a down payment was for a valid consideration. The defendants had no right of election as they contend, but they were bound by the terms of the contract itself. In the absence of fraud in the execution of the agreement, parol evidence is not admissible to vary the terms of the instrument itself. This rule has been set forth so many times that citation is unnecessary. In this case there is no evidence in the record or no proof offered to show fraud on the part of the plaintiff in securing the execution and delivery of the contract and the note.

Defendants cite the case of Alschuler v. Schiff, 154 Ill. 298. But a reading of the evidence in this case fails to show where the law as announced in that case is applicable here. Here there was no agreement, oral or otherwise, or acts of the parties to show that the terms of the written instrument had been abrogated, or terminated. There was no evidence to show a surrender and acceptance. The only matter in evidence shows that the Johnsons notified Mr. Totsch by letter dated December 1, 1953, that they would move in the month of December.



The evidence shows that on December 1, 1953, Mrs. Roy Johnson wrote Mr. Totsch that they were moving during the month of December. No claim is made for reimbursement, nothing is said about carrying out the terms of the agreement, only that they were moving. And either in December 1953, or January 1954, the Johnsons did move. It can hardly be argued that by their action in abandoning the property and failing to live up to the terms of the contract, that the Johnsons had not elected a forfeiture. It is true that the contract itself contained no forfeiture provision. But the actions of the parties themselves would impose forfeiture. This court cannot write into the contract provisions that do not exist, nor does it presume to do so. But the actions of the Johnsons in moving out, and failing to comply with the terms of the contract was a forfeiture of their rights under the contract, namely the right of possession and upon full compliance of the terms of the contract, to receive a deed for the premises. The Johnsons abandoned their rights, but could not abandon their obligations under the contract. The note was a valid and legal obligation to pay.

A number of cases are cited by the defendants in support of their theory that the note for \$2500.00 was in the nature of a forfeiture. These cases might be applicable if the agreement was a lease, but we have held that the agreement was a contract for sale of real estate, and therefore these cases are not applicable to the case at bar.



The defendants set up as a ground for appeal that the trial court erred in holding immaterial and irrelevant evidence that the note was delivered for a special purpose only and in rejecting evidence of other similar transactions by plaintiff, in which other notes were taken. The law in Illinois is well settled that the trial court should be liberal in the receipt of evidence in the investigation of questions of fraud and concerning all matters which tend to disclose the true nature of the transactions. Barrett v. Shanks, 300 Ill. App. 119; First National Bank of Harvey v. Trott, et al., 236 Ill. App. 412; Thornton v. Hendrickson, 213 Ill. App. 121.

In this case the plaintiff was cross-examined fully as to the circumstances under which the note was given. The defendants were each permitted to testify as to all the details of their conversation with the plaintiff in connection with the signing of the note. They were not permitted to give their interpretation of these details, but were permitted to tell what happened. It would seem to this court that the trial court was liberal in permitting full introduction of all evidence concerning the giving of the note, and we can see no reversible error. As to the rejection of evidence of similar transactions, the defendants were permitted to put in evidence the agreements



between the plaintiff and the three other parties buying property from the plaintiff. They were not permitted to put in evidence agreements between these other parties and the plaintiff as to the notes given by the other parties. We must hold as the trial court did, that agreements, if any, concerning notes given by other parties had no bearing and were irrelevant as to the understanding or agreement between the plaintiff and the defendants in this case.

For the reasons stated, the decree and judgment of the Circuit Court is affirmed.

Affirmed.



STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT.

101. A. 339

Arrenda No. 114

Defendant-Appellant.

Appeal from  
Circuit Court of  
Macon County

On September 12, 1955 plaintiff filed a petition in which it is alleged that she is desirous of removing the children from the jurisdiction of the court to the City of Pablo, California; that her present husband is gainfully employed at a brass foundry in San Pablo, California and is willing that the children be in his home. The above appear to be all of the material allegations of the petition. The prayer

STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES  
CITY OF LOS ANGELES

AND COUNTY OF LOS ANGELES

101-4-387

General No. 10000

Double Black Stone

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Double Black

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General No.

Under the terms of a contract made with the  
Trust Company of New York, California and London, Ltd.,  
of the City of New York, the undersigned has  
received the sum of ten thousand dollars and no part  
of the same has been paid to the Trust Company, Ltd.  
as per check No. 101-4-387 for which the Trust Company, Ltd.  
is liable.

On September 15, 1938 (NINETEEN THIRTY EIGHT)  
which is a day when it is a legal holiday in the  
State of California, the undersigned has received  
from the Trust Company of New York, California and London, Ltd.,  
the sum of ten thousand dollars and no part of the same  
has been paid to the Trust Company, Ltd., as per check  
No. 101-4-387 for which the Trust Company, Ltd., is  
liable. The undersigned is a resident of the County of  
Los Angeles, State of California, and is duly qualified  
to act as a witness in the above.

thereof is that plaintiff be permitted to take the children with her to live in California; that an order be entered requiring plaintiff to give bond in an amount to be fixed by the court, conditioned that the children be returned to Macon County, Illinois, at such times as the court may direct; that payment of support money by the defendant be continued and that attorney's fees be allowed to plaintiff.

The defendant answered the petition and also filed a counter-petition in which he asked that the decree be modified by awarding custody of the children to him.

Upon a hearing the court dismissed the counter-petition and entered an order modifying the decree to the extent of permitting plaintiff to take the children to California until the further order of the court. The order further provided that plaintiff file a bond in the sum of \$1000.00 with sureties to be approved by the court conditioned that plaintiff will return the children to the jurisdiction of the court at such time as the court may direct; that defendant pay plaintiff the sum of \$200.00 for her attorney's fees and that the defendant be required to continue paying \$15.00 per week for the support of the children as provided by the original decree. The order further provided that the original decree should in all other respects remain in full force and effect.

The defendant, appealing from the Trial Court's order, contends the same should be reversed for the reason that it is

It is the duty of the Government to provide for the health and safety of its citizens. This duty is not limited to the provision of food and shelter, but extends to the provision of medical care and other services which are necessary for the well-being of the community. The Government is responsible for the health of its citizens, and it is its duty to provide for the health and safety of its citizens.

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against the policy of the law to permit children to be taken outside the jurisdiction of the court where their custody has been given to one parent under a divorce decree; that the evidence fails to show that permitting the children to be taken to California is in their best interest; that the decree should have been modified as to support payments by the defendant; that the order should have provided some means whereby defendant could see his children; and that the court erred in allowing attorney's fees to plaintiff.

From the evidence it appears that the children, whose ages are  $4\frac{1}{2}$  and 10 years, have resided continuously with the plaintiff in Decatur, Illinois since the divorce; that defendant has visited the children in plaintiff's home; that he has been interested in their welfare and has made the support payments provided in the decree; that both parties have remarried; that plaintiff and her husband are planning to establish a home in California; that plaintiff's husband earns \$85.00 per week; and there is no showing that he is not a fit person to associate with the children. It may also be observed that the record indicates no issue was raised on the hearing as to the fitness of either parent to have the custody of the children.

The basis of defendant's argument seems to be the proposition that the order insofar as it permits plaintiff to take the children out of Illinois is contrary to the established

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policy of the State. While this principle has been recognized by the courts in numerous cases, nevertheless it is not an arbitrary rule. It was so held in Schmidt v Schmidt, 346 Ill. App. 436 where the court dealt with facts which are in many respects similar to those involved in the instant case. In the Schmidt case, both parties lived in Highland Park, Illinois. The mother, who had custody of the 10 year old son of the parties contemplated marriage to a man in the State of New York and petitioned the court for permission to remove the child to that State. The fitness of either parent to have custody of the child was not an issue. The husband, resisting the petition for modification, urged upon the court that it had no authority to permit the child to be removed from the State. On appeal from an order allowing the petition, the Appellate Court affirmed the Trial Court's action. In its opinion the Appellate Court after reviewing numerous cases including Miner v Miner, 11 Ill. 43; Hewitt v Long, 76 Ill. 399; Chase v Chase, 70 Ill. App. 572, which are cited in plaintiff's brief, said:

"Most of the cases in this State supporting the legal proposition that a child may not be taken out of the State are based on the Miner case decided more than a hundred years ago. Since that time conditions have vastly changed; methods of transportation have changed. It is customary for people to live a long way from their work. In many large cities people work in one State and live in another.

"In view of modern living conditions to say that as a fixed rule of law, without exception, the child may never be taken from the State out of the jurisdiction of the court seems harsh and absurd. It is

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one of our boys who is dead from the same old war

especially true in this case where the court has retained jurisdiction in the matter and appellee has entered into a bond to carry out the terms of the decree. While this country is made up of a number of States, States are not considered as foreign lands. . . . To hold that the child may never be taken out of the State could in some instances lead to absurd consequences. For instance, a mother with a minor child might live in East St. Louis but be employed in St. Louis, a few miles across the river. To say that the court may never permit a child to be taken from the State out of the jurisdiction of the court would prevent her moving into St. Louis, although her financial condition and the welfare of the child might demand it."

In Wolfrum v Wolfrum, 5 Ill. App. 2d 471, this court approved the action of the trial court in permitting the minor children of the parties to be taken from Montgomery County to reside temporarily in the State of Massachusetts and in so doing followed the reasoning in the Schmidt case.

In view of the above recent decisions it appears to be now settled that there is no positive rule of law preventing the court, in a proper case, from permitting the parent having custody of a child to remove it from the jurisdiction of such court. Under the facts in the instant case we are of the opinion that the trial court was justified in concluding that under the circumstances it was for the best interests of the children that the plaintiff be permitted to take them to the State of California.

In passing upon defendant's contentions concerning modification of the decree as to the support payments and as to failure of the order to provide a means whereby defendant might exercise his rights of visitation, it is to be observed that

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these matters were not apparently urged upon the trial court. The counter-petition prayed only that the decree be modified by taking custody of the children from the plaintiff and awarding it to the defendant. We find nothing in the record indicating that defendant urged upon the court the matter of modifying the provision for payment of support money or that defendant sought to have the court change the visitation provisions of the decree. The record, however, discloses that at the conclusion of the hearing the trial court suggested to counsel for the parties that they determine upon a time for visitation by defendant and that the same might be incorporated in the court's order. Apparently, the court's suggestion was not acted upon. In view of the situation disclosed by the record, we perceive no basis upon which it might be concluded that the trial court erred in failing to modify the order with respect to the support payments and in failing to provide specifically concerning defendant's visitation rights. Neither of these matters appears to have been before the court on the hearing. Furthermore, jurisdiction insofar as these matters are concerned is retained by the trial court and defendant is at liberty to apply for further modification of the original decree or the modification order at any time he sees fit to so do. The defendant further contends the trial court erred in allowing attorney's fees to the plaintiff.



Section 15 of the Divorce Act, Chap. 40, Illinois Revised Statutes 1955 provides for the allowance of attorney's fees in divorce proceedings. Obviously, the instant action is not a suit for divorce. The final decree in the divorce suit was entered October 1, 1952 and the petition herein was filed September 12, 1955. The entry of the divorce decree terminated the divorce case.

The petition herein was not brought to enforce any provision of the decree. The order allowing the petition merely gave the plaintiff permission to take the children to California and contains no finding indicating any violation of the provisions of the decree by the defendant. The filing of the petition was not occasioned by anything which the defendant did or failed to do. On the contrary, it had its origin in a change in plaintiff's circumstances brought about by her remarriage and establishment of a home for the children in California. Her motive in so doing is not challenged. However, we fail to perceive any reason for requiring the defendant to pay the fees of her attorney in prosecuting her petition for modification of the divorce decree. While we hold that removal of the children to California is in their best interest, it does not follow that plaintiff's petition for modification was required by circumstances created by the defendant. The granting of the order while in the best interests of the children necessarily was highly beneficial to plaintiff who was enabled thereby to reside with her husband in another state.

Revised Statute 1903 provides for the payment of damages to the owner of property, in case of injury to the same, by the action of the water. It is not a suit for damages, but it is a suit for the recovery of the value of the property. The amount recoverable is the value of the property at the time of the injury, less the value of the property at the time of the trial. The amount of the damages is to be determined by the jury.

The action is to be brought in the county where the property is situated.

The action is to be brought within two years after the injury.

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Gerson v Mathes, 252 Ill. App. 607; Lehmann v Lehmann, 225 Ill. App. 513 are cases which appear to be applicable to the facts herein.

We are of the opinion that the trial court erred in allowing attorney's fees to plaintiff.

The order insofar as it allows attorney's fees to plaintiff is reversed but in all other respects is affirmed.

Affirmed in part and reversed in part.

Gordon v. Hughes, 225 F. 2d 1007; Wright v. Hughes, 225 F. 2d 1008.

App. 113 are cases which appear to be authority for the proposition that

the rule of the majority in the cases cited above is not applicable to the facts of this case.

The order of the court is reversed and the case is remanded to the court below for further proceedings.

Attorney for appellant and appellee: J. H. H. H.

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GENEVIEVE LAYTON,

Appellant,

v.

GEORGE H. LAYTON,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

JUDGE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff's complaint is for separate maintenance, containing the usual allegations of desertion and that she is living separate and apart from her husband without her fault. Defendant filed a cross-complaint for separate maintenance, making substantially the same charge.

Defendant filed a motion for temporary support money and attorney's fees. The motion was referred to a special commissioner, who heard the evidence, reported his findings of fact and conclusions of law, and recommended that plaintiff pay defendant husband, as temporary support, \$25 per week; also reasonable attorney's fees in the sum of \$350, and the special commissioner's fee of \$200. Upon a hearing of objections to the master's report, the chancellor approved the report and ordered plaintiff to make the payments, as recommended by the special commissioner. A subsequent motion by plaintiff to vacate the order for temporary alimony was denied.

Plaintiff appealed from the order directly to the Supreme Court, attacking the constitutionality of the statute. The Supreme Court's transfer of the cause to this court removes the constitutional question from the case.

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The Separate Maintenance Act, Ill. Rev. Stat. 1955, Ch. 68, par. 22, provides for the allowance of temporary alimony and attorney's fees as in divorce actions. Paragraph 23.2 of the Act provides that the practice and proceedings under the Act shall be the same as that provided in the Divorce Act. The Divorce Act, Ch. 40, par. 16, provides for temporary alimony and attorney's fees to either spouse, and requires a preliminary hearing to ascertain whether it is probable that the charges made by the spouse seeking temporary alimony, can be sustained. If it is found that such charges probably can be sustained, the court in its discretion may grant such temporary alimony and attorney's fees, or deny it, or reserve it until the final hearing of the case.

Considerable testimony was taken before the master, much of which was unnecessary for the determination of the question before him.

The essential facts appearing in the record are: that the parties were married June 21, 1921, in Chicago; that it was plaintiff's second marriage; that they lived together as husband and wife until September 19, 1952; that no children were born of the marriage or adopted; that plaintiff is about sixty-nine years of age and defendant seventy; and that defendant, at the time of the separation, was in poor health, apparently suffering from a cardiac condition.

The parties at the time were living in a two-flat frame building, the title to which was in plaintiff's name, and the gross rental income from the property was \$65 a month.



During most of their married life defendant was a traveling salesman, his several business ventures having failed. His income as a traveling salesman was on a commission basis and varied considerably. His poor health did not allow him to travel steadily.

It further appears that the title to the property referred to was originally taken in joint tenancy by the parties, and he subsequently quitclaimed his interest to plaintiff. Defendant filed a complaint in the Superior Court to set aside the quitclaim deed, claiming there was no delivery of the deed to plaintiff. A decree in that proceeding, after a hearing before a master, set aside the quitclaim deed in question. The Supreme Court upon appeal (5 Ill. 2d 506) determined that plaintiff in this suit was the owner of the property, and reversed the decree with directions to dismiss the complaint for want of equity.

The proof clearly establishes that plaintiff inherited some money from her first husband as well as from her mother's estate, and worked periodically earning money during the time the parties lived together. Her earnings, as well as the money inherited, and the proceeds of an HOLC loan on the property, finally totalled approximately \$9500 at the time of the separation, represented by some cash and securities in her safety deposit box. Defendant, from his earnings as a salesman, paid his traveling expenses and maintenance of the automobile which he used in his work, and would occasionally turn over to plaintiff part of his earnings after paying his



expenses of travel. Whether or not any of his contributions went into the purchase of the property, or were devoted to its repairs, we think is immaterial. The Supreme Court having determined that it is her property, he no longer can claim any interest in it.

The primary question presented is whether the defendant has made such a showing of probability, as the statute requires, that he can sustain the charges in his cross-complaint. He testified that on the day he separated from his wife, he had been advised by the doctor to go away for the winter and return in the spring, and that she agreed to it; that she told him he was not fit to go and did not have the money to go away; that he asked her to give him \$500 for expense money; and that she went to the bank, obtained it, and gave it to him.

When asked: "Q. What was the occasion of your leaving Chicago? A. Well, we had some very severe rag chewing, and it got me all unstrung and nervous. \* \* \* Q. What did you say, and what did she say? A. She asked me where I was going, and I said, 'I do not know. I am just going to hunt for a spot,' and I said, 'When I find a spot that is suitable, I will send for you.' Q. Did you say that? A. Yes. Q. And what did she say? A. She said, 'Do you mean that, George?' I said, 'Yes; I do.'"

The evidence further discloses that defendant on the date of separation travelled in his car to Arkansas, then to Kentucky, down to Georgia, and finally to Florida. According to plaintiff's testimony, throughout his trip she received



only one postal card. He did not disclose his itinerary nor where he intended to finally reside during the winter. He made no request of her to join him and did not advise her of finding any "spot" where she could join him, as he promised. She concluded he had no intentions of returning, hence the reason for filing her suit for separate maintenance.

He testified that his only income was \$25 a month from Social Security. He had a bank account of his own, and it is not clear in the record as to what balance he had in that account.

The evidence falls far short of proof that at the time of filing his cross-complaint he was living separate and apart from her without his fault. At best, it would only tend to prove that the separation was by consent. A separation by consent does not establish a statutory ground for separate maintenance. Vock v. Vock, 365 Ill. 432; Bielby v. Bielby, 333 Ill. 478. In Vock v. Vock, supra, it was said:

"If she voluntarily consents to the separation she is not without fault within the meaning of the statute."

Whether plaintiff can maintain her complaint for separate maintenance is not before us upon this appeal. As to the cross-complainant, his evidence establishes that the separation on September 19, 1952, was by mutual consent, and the parties intended that he would send for her when he found a suitable "spot." The evidence fails to establish that plaintiff was guilty of any misconduct that would warrant his separation from her.



-6-

Upon the present **state** of the record, it follows that the order for temporary alimony, solicitor's fees and special commissioner's fees was not justified.

Accordingly, said order is reversed.

REVERSED.

KILEY, J., CONCURS.

LEWE, P.J. TOOK NO PART.

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101A 340

ELMER BURROUGHS,

Appellant,

v.

CHICAGO TRANSIT AUTHORITY, a  
Municipal Corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

JUDGE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brings this action under the Occupational Disease Act (Ill. Rev. Stat., Ch. 48, §§137.3 and 137.4) and the rules and regulations of the Industrial Commission adopted pursuant to the authority granted it by the statute. Defendant made a motion to strike the complaint, alleging, among other things, the unconstitutionality of the statute and the regulations made pursuant thereto. The motion was denied. A hearing without a jury resulted in a finding and judgment for defendant, from which judgment plaintiff appeals.

Upon this appeal defendant has filed a written waiver of the constitutional objection to the statute and submits to the jurisdiction of this court.

The second amended complaint and amendment thereto in substance alleges that plaintiff was employed by the defendant as an operator of one of its buses; that in performing his work as a bus driver, it was necessary for him to secure the bus from the garage maintained and operated by defendant; that he was subjected, in the performance of his duties, to noxious and poisonous gas, emitted from the bus assigned to him and other buses in the garage, before driving

Page 1

1. The first part of the report deals with the general situation of the country and the progress of the work done during the year. It also mentions the names of the persons who have been working on the project.

2. The second part of the report deals with the results of the work done during the year. It mentions the names of the persons who have been working on the project and the results of their work. It also mentions the names of the persons who have been working on the project and the results of their work.

the bus assigned to him from the garage to the public highway; that the regulations of the Industrial Commission, set up in the complaint, required a certain number of cubic feet of air ventilation per minute, per person, in the garage of the defendant; and that defendant violated these regulations, as a result of which plaintiff suffered a severe and acute muscular, lung, circulatory, heart and artery condition, and a permanent impairment of the internal organs, muscles, lungs, circulatory system, heart and arteries, and a permanent abnormal operation of the same.

In the amendment to the second amended complaint, it is alleged that plaintiff brings this action for damages arising from injury to the health of plaintiff, and contracted or sustained in the course of the employment of plaintiff, and proximately caused by the negligence of defendant, as provided by section 3 of the Occupational Disease Act, and charges defendant with violation of the rules of the Industrial Commission pursuant thereto.

The theory of plaintiff upon the trial below was that the violation of the regulations referred to caused plaintiff to have a coronary attack, and resulting cardiac injury, due to plaintiff inhaling carbon monoxide gas emitted by the buses in the garage while he was performing his duties.

It became necessary upon the trial for plaintiff to prove (1) that plaintiff inhaled carbon monoxide gas, and (2) that there was a causal relation between the negligence charged to defendant and the condition of plaintiff's ill-being.

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Dr. O'Connor, called as a witness for plaintiff, testified from records of the Hines Veteran Hospital, to which plaintiff was taken, and which records were admitted in evidence without objection. The records contained the X-rays and cardiograms taken of plaintiff, and the witness agreed with the findings in the record made by the roentgenologist, and the findings of the attending physicians based on the cardiograms. These findings, appearing in the hospital records, are:

"Chest, Pa:

"The diaphragm, heart and aorta are normal. The hilar shadows are satisfactory. The lung fields are clear. The thoracic cage is intact. Impression: Normal chest. Comparison with examination dated 3-4-53 shows no change.

G. Swicky, M. D."

"Chest: The lungs and diaphragm appear normal. The transverse cardiac diameter is about 7% above average but the configuration of the heart shadow does not appear abnormal.

M. Littner."

"Chest Pa: The transverse cardiac diameter measures 13.1 cm which is normal according to the Clark Ungerleider table. The hilum shadows are normal in pattern and the peripheral lung fields are essentially clear. In comparison with the film dated 7-24-53, there has been no significant change.

"Conclusion: Essentially normal chest.

R. E. Bodwin, M. D."

The doctor further testified that there is nothing in the clinical record which shows the presence of carbon monoxide poisoning in plaintiff's exhibit 5, which was identified as the hospital record referred to.



Dr. Smith, called as a witness for plaintiff, in response to the hypothetical question propounded to him, covering the circumstances alleged to have caused plaintiff's ill-being, said:

"I have no way of knowing the actual concentration of carbon monoxide that was in the atmosphere of the garage. I don't know exactly how long the individual was exposed to it, or exactly what the activities were at the time, other than what you said.

"I would say that it is entirely possible that a significant amount of carbon monoxide was present in the air, it is entirely possible that this individual may have been exposed to this carbon monoxide for a long period of time for him to develop a significant concentration in the blood. If the level of carbon monoxide were high enough, then the individual would absorb enough to be significant."

He further testified that he never had a case of acute myocardial poisoning resulting from carbon monoxide poisoning, unless the instant case is one, and that from his examination of the hospital records he finds no indication of the presence of carbon monoxide poisoning.

On the other hand, the medical testimony of the several witnesses for defendant establishes that the hospital records do not indicate the presence of carbon monoxide poisoning and none of the clinical signs or symptoms of it; that there were no well recognized tests made to show the presence of carbon monoxide; therefore there is no basis for making a diagnosis of carbon monoxide poisoning.

We are unable to agree with plaintiff's contention that there is sufficient evidence of causal connection between the violation of the rules and regulations of the Industrial



-5-

Commission, as alleged in the complaint, and plaintiff's cardiac condition. We cannot say that the judgment is against the manifest weight of the evidence.

In view of the conclusion reached, we deem it unnecessary to determine the question raised by defendant as to the applicability of the statute and the rules and regulations of the Industrial Commission to the type of garage described in this record and the duties performed by plaintiff therein.

The judgment is correct, and it is affirmed.

AFFIRMED.

LEWE, P.J. AND KILEY, J., CONCUR.



568 A

46796

CAMILLE DE ROSE,

Plaintiff,

v.

GEORGE C. ADAMS,

Defendant - Appellant,

GEORGE W. FAULKNER,

Receiver - Appellee,

A. M. BURROUGHS,

Appellee.

10 I.A. 341<sup>2d</sup>

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

JUDGE FEINBERG DELIVERED THE OPINION OF THE COURT.

The appeal is from an order approving a final report and account of a receiver appointed in the cause, discharging the receiver, and cancelling his bond.

Objections filed by defendant to the final report and account of the receiver, as well as to two previous current accounts, came up for hearing before the court upon proper notice and motion.

It appears that copies of rent receipts for the rent collected by the receiver were submitted to the court, by defendant, for consideration, in support of said objections. Defendant claims that the court refused to consider them. These were thereupon filed by defendant with the clerk without any order of the court giving him leave to file them. They are not preserved for our consideration by any report of proceedings.



-2-

These documents were filed with the record upon this appeal. The receiver, on December 14, 1955, upon proper notice to defendant, moved in this court to strike said documents from the record. No countersuggestions were filed. On December 16, 1955, we allowed the motion and struck from the record the documents listed in said motion.

In order to consider the errors assigned by defendant for a reversal of the order appealed from, it was necessary that defendant preserve the documents and exhibits referred to by a proper report of proceedings, which is lacking. We must therefore assume, in the absence of a report of proceedings, that the court was justified in entering the order appealed from.

Accordingly, said order is affirmed.

AFFIRMED.

LEWE, P.J. AND KILEY, J., CONCUR.



569 A

101.12.2

Appellant,

V.

COOK COUNTY.

Appellee.

This is an appeal from an order denying plaintiff's petition for an increase in child support.

The parties were married in 1948, separated in 1952, and in March 1954 they made a property settlement agreement under which plaintiff was to receive \$40,000 over four years, plus \$2,750 attorneys' fees. Defendant agreed plaintiff would have custody of the children, a girl then aged four years and a boy aged one and one-half years, and that he would pay her \$130.00 per month for their support. In addition, defendant agreed to deposit \$1,000 in a bank for each child until he or she reached 21 years or until the court ordered otherwise. Plaintiff agreed to quit claim all interest in defendant's real estate and by June 1, 1954 to relinquish possession of defendant's apartment, which she then occupied. The agreement was approved and incorporated into the decree of March 9, 1954 which granted plaintiff a divorce. October 1954 plaintiff filed a petition asking an increase in child support. The court heard evidence and entered the order from which plaintiff appeals.

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1913-1914

1914-1915

The parties do not dispute the law applicable to the question of the propriety of the chancellor's order. There is no question of defendant's ability to pay more than \$130.00 monthly for support of the two children, and his attorney at the trial stated defendant's willingness to pay whatever the proof showed the children needed. Plaintiff's individual rights are not involved.

The precise question is whether the children require an increase in support, viewed in the light of their best interests, and whether the chancellor abused his discretion in deciding they do not.

The proof does show a change of circumstances in that plaintiff since June 1, 1954 has been obliged to pay \$125.00 per month for rent. We think, however, the decree contemplated this change because she agreed to relinquish possession of defendant's apartment on June 1. Furthermore, the provisions of the decree with respect to child support plainly looked beyond this date and indicate that the parties intended plaintiff should provide a home for the children whose custody she was given. This prospective element distinguishes the understanding in Hilliard v. Anderson, 197 Ill. 549, where the parties intended the allowance to be only for the summer months.

Plaintiff testified that she spent "never less than \$100.00 for clothing" each month for the children and generally \$135.00 per month; that she usually spent \$22.25 each month for baby sitters at \$1.00 or \$1.25 per hour; that the food bill averaged about \$150.00 to \$169.00 monthly,

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including \$50.00 for her food; that her average monthly milk bill was \$32.00; and that her average over-all expenses each month were about \$595.00. On this testimony we think the chancellor could reasonably conclude that plaintiff had failed to establish that the best interests of the children required an increased allowance.

Where there is an agreement between the parents, the terms will be given effect when consistent with the controlling consideration, which is the welfare of the child. 39 AM. JUR., Parent and Child, §42; 27 C. J. S., Divorce, § 319d. Plaintiff, it seems to us, relies too much on showing the wealth of defendant without showing what the best interests of these small children require. For instance, very often too much clothing is as harmful as too little, regardless of the financial ability of the parents. In any event, on the record we think plaintiff has not shown that the chancellor abused his discretion.

The facts set forth and the ages of the Novak children here distinguish Hilliard v. Anderson, 197 Ill. 549. In Diver v. Diver, 1 Ill. App. 2d 87, the ages of the children did not differ greatly from the Novak children but the chancellor and this court in that case recognized the need arising from the new circumstances.

For the reasons given the order is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND FEINBERG, J. CONCUR.



570

A

10 I.A.<sup>2d</sup> 343

46818

PAUL A. CORSO,

Appellant,

v.

ETHEL FISHER DIXON, et al.,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit for damages based on an alleged breach of contract for a lease and on fraud. The suit was dismissed on motion of Ethel Dixon and Katherine Dixon Agar, trustees of the property involved and herein called defendants. Plaintiff has appealed from the judgment for defendants.

In an earlier appeal, this court reversed a judgment for Hogan & Farwell, defendants' managing agent and appellee on that appeal, based on its motion to dismiss plaintiff's suit. Corso v. Dixon, 348 Ill. App. 378. The defendants were not served with summons until after the filing of the mandate and the reinstatement of the cause in the trial court. The question of law before us now is whether the decision of this court in the first appeal establishes the validity of plaintiff's complaint as to defendants.

Plaintiff contends that in the prior appeal the complaint, dismissed again by the trial court, was held to state a good cause of action and that this is the law of the case also against defendants. Defendants were not before this court at the time of the earlier appeal. The trial



court's opinion is, therefore, that their rights were not adjudicated and that the decision did not preclude their attacking the complaint on grounds not raised by the motion of other defendants.

Defendants, to support the judgment, rely on the following points which they say were not adjudicated on the prior appeal: (1) Plaintiff's allegations of damages are conclusions. (2) The complaint does not allege facts to support the allegation that plaintiff was "compelled" to vacate the premises. (3) If plaintiff's claimed right is valid, he could not be dispossessed either by defendants or by the successor lessee. (4) The defendants, trustees, could not delegate to Hogan & Farwell their discretionary powers to make the agreement plaintiff claims. (5) Defendants as trustees are not liable as trustees with respect to the allegations of fraud in Count II.

We agree with plaintiff that the prior appeal (348 Ill. App. 378, 384) disposed of the contention with respect to the allegations of damages, that the allegations are sufficient and that the evidentiary facts are a matter of proof.

The complaint alleges in Count I that the parties entered into an oral agreement to execute a five-year lease at the termination of the present lease and binding defendant to immediately consent to the assignment to plaintiff of the existing lease. It alleges further that defendants, through their agents, gave written consent to the assignment, but

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refused to grant the lease as agreed, despite plaintiff's several demands; and that plaintiff was therefore "compelled to vacate" and suffered damages in the liquidation of his stock. We think this is a sufficient allegation of the ultimate fact that he was forced to vacate. The reasons why are a matter of proof.

The basis of plaintiff's action is not a lease, but the alleged oral contract for the lease. We see no merit, therefore, in defendants' contention that since plaintiff claims he was entitled to possession by reason of his contract he therefore voluntarily abandoned the premises and consequently has no cause of action against them. If the defendants leased to another in breach of the contract, plaintiff's cause of action then arose. There was no necessity for him to attempt to remain on the premises and incur defense of his possession, at further expense, against one with a written lease. Plaintiff does not allege any right to possession, but claims breach of a contract which should have given him possession.

Plaintiff alleged that defendants as trustees were owners of the premises and that Hogan & Farwell, managing agent, through its employee and agent, Martin, made the contract with him. Defendants contend they, as trustees, could not have delegated their authority to exercise discretion in the making of the alleged contract. This is a matter of defense and it is not to be presented by a motion to strike.



Defendants are not liable in a suit at law as trustees; if, however, the complaint states a cause of action against them personally, the word "trustees" must be held to be a word of description, since it could have no other use in the complaint. Wahl v. Schmidt, 307 Ill. 331, 341. The complaint alleges a cause of action based on fraudulent representations of defendants through their agents. The word "trustees" therefore is merely descriptive of the persons and the liability is alleged against defendants personally.

We have considered all the points raised and we think the judgment is erroneous. The judgment is reversed and the cause is remanded for further proceedings.

JUDGMENT REVERSED AND REMANDED.

FEINBERG, J. CONCURS.

LEWE, P.J. TOOK NO PART.



571 A

10 I.A.<sup>2d</sup> 343

46854

K. K. KINDWALL,

Appellee,

v.

LARSON & RINGIUS, INC., an  
Illinois Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit to recover salary alleged to be due under an employment contract between plaintiff and defendant. Trial by the court without a jury resulted in a finding and judgment for plaintiff in the amount of \$625.00. Defendant has appealed.

Plaintiff, John Larson and N. G. Kindwall on February 8, 1950 were owners of all the stock of the Kindwall Bros. & Larson, Inc. On that date they made an agreement which secured to the survivors among the three a preference in the purchase of the stock of any one or more of them who might die. During the period 1951 to 1953 inclusive, plaintiff and Larson each drew annual salaries of \$15,000.

September 1, 1954 an employment contract between Kindwall Bros. & Larson, Inc. and plaintiff was drawn but not executed. It contemplated plaintiff's stock ownership at the origin of the corporation, his service as an executive officer and employee since that time, his agreement to sell his stock, his desire to limit his work due to his advanced age, his previous \$15,000 salary and the corporation's desire that he remain as consultant to be called on as occasion

*Journal of Management Studies*

$\frac{1}{\sqrt{\pi}} \int_{-\infty}^{\infty} f(x) e^{-x^2} dx = \frac{1}{\sqrt{\pi}} \int_{-\infty}^{\infty} f(x) e^{-x^2} dx$

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1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971) using a Shimadzu 1601 UV-Visible Spectrophotometer.

required for "advice, counsel, guidance, and other service. . . ." The contract contained defendant's promise to employ plaintiff for life "in an executive capacity, or as an consultant, at the option of the corporation," at \$125.00 weekly.

December 14, 1954 plaintiff agreed to sell Larson his 29% stock in Kindwall Bros. & Larson, Inc. The preamble of this agreement referred to the discussion by the "parties" of retirement of plaintiff's interest and to the agreement "upon the means of disposition of the various rights" of plaintiff in the corporation. The purchase price was \$25,000.

Larson, as owner of more than 51% of the stock due to his purchase of both Kindwalls' interests, agreed to call a directors' meeting to make an employment agreement, "similar in substance and in form to the contract presented at the time of signing . . . this agreement" guaranteeing plaintiff life-time employment with Kindwall Bros. & Larson, Inc. or any successor corporation. Larson bound himself to vote the controlling stock for continuance of the employment contract and restricted himself from voting in "derogation" of it. Any change of name of the corporation was not to effect the contract and any sale of Larson's stock would carry his contract obligations. Plaintiff agreed to give the corporation "when called upon to do so, such of his time, attention, knowledge and service," as the corporation requested. The agreement bound the corporation to continue plaintiff in its medical insurance program. The employment contract previously drawn was the one referred to in the stock purchase agreement and was executed contemporaneously.



February 8, 1955 defendant, as successor corporation, wrote plaintiff "Kindly report for work Thursday February 10, 1955." Plaintiff did not respond or report. On May 23, 1955 defendant again wrote plaintiff enclosing checks "which pay you up to . . . May 21, 1955" and directing him to report "for duty" May 26 at nine A. M. to perform "such services" as the corporation should direct three hours daily, five days per week. "Your failure to do so will constitute a breach of the contract . . . ." Plaintiff did not respond or report for work and was not paid thereafter.

Plaintiff was at no time before the letter told what his duties would be. Larson testified plaintiff was to "do what he was always doing" prior to July 1, 1954. That was about four hours work per day, five days per week. Plaintiff was paid \$15,000 annually until September 1, 1954, after which his salary was \$125.00 per week though he did no work after the December agreements.

The trial court thought the testimony showed an understanding that plaintiff was to do no work, was never to be called on to perform services and that the employment contract was tied to the sale of the stock.

The trial court over objection admitted into evidence the stock purchase preference contract of 1950, the contract for the sale of plaintiff's stock to Larson, testimony of plaintiff's relationship with Kindwall Bros. & Larson, Inc. and testimony that Larson said "I don't want him around here." Defendant contends here that this testimony was inadmissible as tending to vary the terms of the contract in violation of the parol evidence rule. We disagree.

[illegible][illegible]

The employment contract is not specific as to plaintiff's employment obligation. It reads as though plaintiff was being rewarded for long service with a weekly income for life in return for occasional services as consultant or guide. Defendant's letter of May 23 however interprets the contract as one obligating plaintiff to work three hours daily beginning at nine A. M., five days each week. Because plaintiff refused to accept this interpretation, defendant sought to terminate the life-time employment contract. Under these circumstances we think the court properly admitted the evidence objected to in order to show the basis for the employment contract. Leonard Ashbach Co. v. Lear, Inc., 3 Ill. App. 2d 254. The admitted evidence was not intended to, and did not, vary the terms of the contract.

We think the evidence justified the conclusion of the trial court that the employment contract was tied to the stock purchase contract. It will be noted that the employment contract was drafted September 1, 1954, but not executed, and plaintiff not paid the weekly compensation, until the stock purchase contract was executed.

Finally we think there is no merit to the contention that the evidence does not support the finding for plaintiff. The court was in a better position than we to decide whom to believe on the controverted questions of fact. It is uncontroverted that plaintiff was paid \$15,000 annually before September 1, 1954 for four hours work per day, five days per week. It is unlikely he would oblige himself to work three hours daily starting at nine A. M., five days per week at \$125.00 weekly. Furthermore, he was paid this weekly sum from September 1, 1954 to May 23, 1955 though he did no work.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG, J. CONCURS.  
LEWE, P.J. TOOK NO PART.



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46787

LA SALLE NATIONAL BANK,  
as Trustee under Trust  
No. 17851,

Appellee,

v.

ALVA WILSON,

Appellant.

10 LA. 2d 439

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

JUDGE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered for possession in an action of forcible entry and detainer. Defendant contends that plaintiff failed to prove its right to possession within the limitations of paragraph 2 of section 2 of the Forcible Entry and Detainer Act, Ill. Rev. Stat., 1955, ch. 57.

The record in the case is very limited. Plaintiff claims ownership as trustee for certain beneficial owners, who were purported to have purchased the premises in which defendant resided from certain parties whose names and relationships are not explained. No documents of any kind were offered or admitted in evidence to show the title or right to possession of plaintiff. The only testimony pertaining to the title was an explanation by the attorney for plaintiff which is vague and indefinite as to how plaintiff acquired title. Attorney for plaintiff further testified that defendant was requested to pay rent and she refused. A demand for possession was claimed to have been served upon defendant. This demand, however, is not a part of the record nor is there a showing as to its form, contents or whether it was in



writing.

Defendant testified that she lived in the premises for about two years; that when her husband was alive he collected the rent for the premises and acted as its owner; that at no time did she or he ever pay rent to anyone.

Actions under the Forcible entry and Detainer Act are purely statutory. A right of action exists under the second paragraph of section 2 of the act "when a peaceable entry is made and the possession unlawfully withheld." This language has been construed to mean that a peaceable entry must have been made upon the premises in the actual possession of either the plaintiff, or of those to whose rights it has succeeded, and the possession must thereafter be unlawfully withheld after demand in writing. Layzod v. Martin, 305 Ill. App. 1; West Side Trust & Savings Bank v. Lopoten, 358 Ill. 631; Fitzgerald v. Quinn, 165 Ill. 354; Kaufman v. Miller, 214 Ill. App. 236.

In the instant case the record does not reveal any evidence which tends to connect the title or right of possession of plaintiff with the title of any person who had been in actual possession or entitled to possession as against the defendant. There is no showing, in fact the evidence is to the contrary, that defendant ever attorned to plaintiff. There is no proof of the service of a demand for possession in writing and no document purporting to be one was offered or admitted in evidence.

The trial court gave no explanation as to the



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basis on which it made its finding. In the record before us we find no evidence that could possibly be construed to justify the trial court in giving plaintiff judgment for possession. The judgment of the trial court is reversed.

Judgment reversed.

McCormick, P. J., and Schwartz, J., concur.



585 A

46810

EMILY WEINER, WILLIAM WEINER  
and BARBARA WEINER, a minor,  
by WILLIAM WEINER, her father  
and next friend,  
Appellants,  
v.  
PATRICK BATTISTA and ARLENE  
BATTISTA,  
Appellees.

10 I.A. 490  
APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY,

JUDGE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered on a verdict in favor of defendants in a personal injury case. Plaintiff William Weiner while driving his automobile stopped suddenly because two boys riding on one bicycle turned into the path of his car. Defendant Patrick Battista, driving the car behind plaintiffs, struck plaintiffs' car in the rear and shoved it a distance of a foot or two. The drivers and passengers of both cars got out and, according to Patrick Battista, Weiner looked at his car and said "There is no damage and no use of my taking your number." Plaintiff Emily Weiner, however, took Battista's license number and name. Defendant Patrick Battista asked if any one was hurt and the reply was no. The only damage to plaintiffs' car, according to defendant Patrick Battista, was that the truck was bent at the side of the handle. Weiner and Battista both drove their cars away. There is a somewhat different version of the accident given by plaintiffs and some inconsistencies



-2-

in the testimony of defendants' witnesses. However, the jury found against the plaintiffs, and there is ample evidence to sustain the verdict.

Complaint is made of three instructions. One appears from the record not to have been given and we therefore need not consider it. The second charges the jury that if it believes from the evidence "that the sole cause of the injuries to the plaintiffs, if any, was the manner in which the automobile they were riding in was being operated, then it is the duty of the jury to find the defendant not guilty." Plaintiffs state that while this would be a proper instruction under certain circumstances, it is not proper in a case such as this, where two vehicles were involved and one is singled out. In Union Traction Co. v. Leach, 215 Ill. 184, involving a collision between a streetcar of the defendant and a carriage of the plaintiff, the Supreme court approved an instruction charging the jury that:

"If the jury believe, from the evidence, under the instructions of the court, that the sole cause of the injury to the plaintiff was the negligent manner in which the horses and carriage in question were driven or managed, if you believe, from the evidence, that such horses and carriage were negligently driven or managed, then it is the duty of the jury to find the defendant not guilty."

We find no error in the giving of the instruction in the instant case.

A third instruction charged the jury that if the "alleged injuries were accidental and that neither

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the plaintiffs nor the defendant was negligent, the jury should find the defendant not guilty." Courts have at times criticized peremptory instructions emphasising the assumed accidental aspect of a collision such as the one in question. We do not consider that the use of the instruction in this case was reversible error.

Plaintiffs also complain of error with respect to the admission of evidence. Defendant Patrick Battista testified that he and his wife Arlene Battista had two children; that his wife could not leave them and that was the sole reason for her not appearing. We do not consider that to be error.

Judgment affirmed.

McCormick, P. J., and Robson, J., concur.



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Abstract

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Gen. No. 10925

Agenda No. 4

IN THE

101.A.2.491

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APPELLATE COURT OF ILLINOIS

JUN 4 - 1956

SECOND DISTRICT

JULIUS R. RICHARDSON  
CLERK, PROTEMPORE  
Appellate Court Second District

May Term, A. D. 1956

EDNA CHITTUM,

Appellee,

vs.

)  
)  
) Appeal from the Circuit  
) Court of Peoria County.  
)  
)

WILLIAM JOSEPH, and MICHAEL  
JOSEPH, d/b/a JOSEPH BROS.  
SUPER MARKET, a Partnership,  
Appellants.

EOVALDI, J.

On December 15, 1951, at approximately 6:30 P.M., the plaintiff, Edna Chittum, and her fourteen year old daughter, Beverly, went to the grocery store owned and operated by the defendants, William Joseph and Michael Joseph, who were partners, doing business as Joseph Bros. Super Market in Peoria, to purchase a Christmas tree. The plaintiff had lived a short distance from the store for about five years and was a regular customer there. When they arrived at the store, the Christmas trees, which were displayed on the sidewalk in front of the store in the daytime, had been moved to an open areaway at the rear of the store for the night. The defendant, William Joseph, suggested to the plaintiff that she might be able to

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JUN 4 - 1956

JULIUS R. RICHARDSON  
CLERK, PROBATE  
Vermont Court Second District

make a better selection of a tree in the daytime, but after the plaintiff told him that her daughter wanted to decorate the tree that night, he consented to take her to the rear of the store to pick out a tree.

The defendant, William Joseph, then secured a flashlight and led the plaintiff through the store to the open area at the rear where the trees were located. This area had no roof, and there were patches of ice and snow scattered over it. It was unlighted at the time of the accident except for the flashlight which William Joseph had with him. The plaintiff followed Joseph from the doorway about fifteen feet to a place within a foot or two from the trees. He showed several trees to her, picking them up with one hand and holding the flashlight with the other hand. While performing these acts, he slipped or tripped and fell against the plaintiff. She testified that she was knocked down and was injured by the fall and by William Joseph falling on her.

The case was tried before a jury. Motions for directed verdicts at the close of plaintiff's evidence and at the close of all the evidence were denied. The jury returned a verdict in favor of the plaintiff for \$5500.00. On the trial court's refusal to grant the motion filed by defendants for judgment notwithstanding the verdict of the jury, the defendants have taken this appeal, contending that the trial court erred in overruling said motion. The sole question is whether there was sufficient evidence to go to the jury on plaintiff's due care and defendants' negligence.

There is no conflict in the authorities concerning the test of the sufficiency of the evidence where the appeal is based upon the alleged error of the trial court in refusing



allowance of a motion for judgment notwithstanding the verdict. Our Supreme Court said in *Todd v. S. S. Kresge Co.*, 384 Ill. 524, at pp. 526, 527:

"The scope of the inquiry of this review is restricted, as it was in the trial court and on the second appeal in the Appellate Court, to the questions that arise on a motion for a judgment notwithstanding the verdict. The question available to a movant under such a motion has been announced in many cases, one of the more recent being *Merlo v. Public Service Co.*, 381 Ill. 300, where it was said that these motions present only questions of law as to whether, when all of the evidence is considered, together with all reasonable inferences drawn therefrom, in its aspect most favorable to the plaintiff, there is evidence tending to prove any cause of action stated in the complaint. If there is, the motion should be denied, and the weight and credit to be attached to it in connection with the other facts and circumstances shown are questions for the jury."

To the same effect are other cases both in our Appellate and Supreme Courts. This court must therefore review the record of proceedings to determine if there is any evidence in the record, which, standing alone and taken with all its intendments most favorable to the plaintiff, tends to prove the material elements of her case.

Appearing in the record and in the abstract are certain photographs introduced by the defendants. Two of these photographs disclose that inside the store building the aisles were kept clean and dry, free from foreign substances, and well lighted. They portrayed how the defendants complied with the duty to furnish an invitee a <sup>reasonably</sup> safe place to purchase merchandise. The other two photographs show the area where the Christmas trees were shown to the plaintiff and where the incident occurred. These pictures showed a concrete slab, cracked and



broken, of irregular surface. Add to these pictures the hazards of patches of ice and snow, and utter darkness except for a hand flashlight, and we have quite a different place awaiting an invitee, whom the evidence shows had no knowledge of the existence of these conditions, and who was not warned of them. The defendant, William Joseph, testified that there was no light in that area. There was introduced into evidence the testimony of Pauline Deahl, a shorthand reporter, who testified in substance as follows: "On October 14, 1954, I was present when the deposition of Mr. William Joseph was taken at 1128 Jefferson Building in Mr. Cassidy's Office. On that occasion this question was asked of Mr. Joseph, 'Then as she stood there, what did you do? Were you looking through various trees and showing them to her?' and Mr. Joseph made this answer, 'If I can recall, probably lifted some up because there is always trees that fall down, that lay down against the building, and I feel I lifted up and shook them and showed a couple of them.' Mr. Joseph was asked this question, 'And then what happened', and he made this answer, 'Evidently in doing that, in moving them around, I slid, I fell against her, and she fell,' and then Mr. Joseph was asked this question, 'In other words, you slipped on something on the ground?' and he answered, 'Slipped on the ice'. Mr. Joseph was asked this question, 'Did you ever take any people out to the back prior to the time you took Mrs. Chittum out there', and he made this answer, 'Very seldom, but I have done it before; yes, sir.' Mr. Joseph was asked this question, 'But from time to time people would want trees and you would go back there', and he made this answer, 'I have done it, yes'. Mr. Joseph was asked this question, 'Was there a lot



of ice on the lot back there', and he answered, 'There was'." On cross-examination William Joseph testified that he did not know whether or not plaintiff had ever been back in this area before this particular evening.

It cannot be said that there is no evidence standing alone tending to show a breach of duty to furnish this invitee a reasonably safe place to shop. At the time of her injury the plaintiff was an invitee upon the defendants' premises and the defendants owed to her a duty to exercise due care in the conduct of their business and to guard against subjecting plaintiff to danger of which they were cognizant and which might reasonably have been anticipated. *Smith v. Kroger Grocery & Baking Co.*, 339 Ill. App. 501, 506. Further, the defendant, William Joseph admitted in his testimony that he fell against plaintiff and knocked her down. He admitted that he knew the ice was there and that he was handling the trees with one hand and the flashlight with the other. This was evidence from which the jury might decide that he was negligent.

The defendants' contention that the plaintiff was guilty of contributory negligence as a matter of law is untenable. The question of contributory negligence is ordinarily one of fact for the jury to decide under proper instructions. Contributory negligence becomes a question of law only when it can properly be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts did not establish due care and caution on the part of the person charged therewith. *Thomas v. Buchanan*, 357 Ill. 270, 277; *Markus v. Lake County Ready-Mix Co.*, 6 Ill. App. 2d 420. In the instant case there was sufficient evidence in the record to



go to the jury upon the issue as to whether the plaintiff, at the time of the incident in question was in the exercise of ordinary care and caution for her own safety. The evidence shows that the plaintiff, on arriving outside the building, found it was dark except for William Joseph's flashlight. She stood still, so far as the record shows, while William Joseph showed her the various trees. He actually sold her a Christmas tree that evening making a profit of 25¢ or 30¢. She testified she was always within a foot of the Christmas trees. This would seem to be consistent with what a person of ordinary prudence would do under like circumstances. After a thorough examination of the record, we are of the opinion that there is sufficient evidence in this case to meet the test as to the sufficiency of the evidence on motion for judgment notwithstanding the verdict set forth in the Todd case, supra, and that the trial court committed no error in refusing to grant the defendants' motion for judgment notwithstanding the verdict. The judgment of the Circuit Court will therefore be affirmed.

Judgment Affirmed.

*Howe P. J. Concurr.*

Crow, J. Concurr



That.

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Abstract

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Gen. No. 10938

Agenda 13

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JUN 4- 1956

JULIUS R. RICHARDSON  
CLERK, PROTEMPORE  
Appellate Court Second District

IN THE  
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1956

101A 24 92

WILLIE MAE HOLMES,

Appellee,

vs.

JOSEPH HOLMES,

Appellant.

)  
)  
) Appeal from the  
) Circuit Court of  
) Lake County.  
)

EOVALDI, -- J.

This is an appeal from a final decree divorcing appellee, the wife, from appellant on the grounds of extreme and repeated cruelty; and directing the husband to convey his interest in certain joint tenancy real estate to the plaintiff, as well as finding that the husband had no interest in the described real estate, personal property, furniture, or furnishings in the home.

The complaint alleged that the parties were married on or about the 7th day of July, 1943, and had no children; and charged that defendant had been guilty of extreme and repeated cruelty towards plaintiff on numerous occasions, and particularly on the 15th and 25th days of August, 1955. The complaint further alleged that plaintiff had contributed a substantial portion of her earnings to the

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JULIUS R. RICHARDSON  
CLERK, PROBATE  
Appellate Court Second District

purchase of a house owned jointly by the parties, and also contributed money for the purchase of furniture and household furnishings in the home; and that on July 13, 1951, the plaintiff, at defendant's request, paid the defendant the sum of \$500.00 in full and complete satisfaction of his interest in the home. The answer denied the allegations of the complaint and alleged that on or about said July 13, 1951, plaintiff requested the defendant to leave their home, and defendant at that time requested a loan of \$500.00 from the plaintiff; and further alleged that defendant resumed living and cohabiting with plaintiff in September, 1951, and continued to contribute to the maintenance of the home and towards the payment of the mortgage on same. In addition, a special defense was filed alleging the statute of frauds.

The principal contentions of the appellant are that the evidence does not sustain the allegations of the complaint as to extreme and repeated cruelty; that there were no special circumstances and equities serving as a basis for the order directing the conveyance of real estate belonging to the defendant; and that the Court erred in admitting in evidence plaintiff's exhibit 1, being the purported property settlement executed on said July 13, 1951.

The only witnesses who testified in the case were the parties, and they each testified for themselves. In support of her charge of cruelty, the plaintiff testified that her husband had treated her cruel since 1950--the last occasion being August 25, 1955. Her testimony as to that occasion was as follows: "On that day he wanted money out of



the bank--he told me he lost his vacation check and pay check playing the horses--I did not give him any money. We got into an argument and he beat me up. He threw a chair on me, then he beat me about the head and shoulders with his fist. On the back and neck and on the shoulders and arms with his fists--they were hard blows--I was sore."

As to the other occasion set up in the complaint, i.e., August 15, 1955, she testified as follows: "The time before he was cruel on the 15th of August--he did the same thing, he beat me up again over the head and neck and arms and body, with his fists, they were painful--I was bruised under my clothes, I guess, but I couldn't see that. The basis of that argument was he wanted me to get money out of the bank--he was on vacation then--he was home at the time--I don't know if he was on vacation." On direct examination, the following question was asked plaintiff:

"Q. You lived together as man and wife until when?"

and she answered,

"A. We never got along for three months before I filed for a divorce. My daughter and I sleep together and he sleeps in my daughter's bedroom."

On cross-examination plaintiff testified that no one was present in the house on August 15, 1955, and that she told no one about the beating; that her daughter lived with her and she did not tell her about it and that she did not go to a doctor; and that she went to work the next morning; that on the 25th day of August the alleged beating took place in the afternoon, in the dining room on the second floor, where they lived; that she never told anyone about this beating; that she did not



go to a doctor and that she lost no time from work. As to the August 15 occurrence, the following question was asked on cross-examination:

"Q. On August 15th, what time of the day did it take place?

"A. I don't know what time, but it was in the afternoon. I can't tell approximately what time. It was in the afternoon. I don't know if it was as soon as I came from work or if I didn't work that day. I am not sure just now."

In answer to the following question by the court:

"Did he ever strike you on any other occasions except the two you have testified to?"

plaintiff answered,

"Oh, yes, several different times. I can't give the date. Sometime in the spring of 1955. He struck me a couple of times in the bedroom in the spring of 1955. I was alone on these occasions. After that we got along very bad. My daughter has kept him from hitting me with pots and different things."

On redirect examination, plaintiff testified that there were times when defendant tried to strike her and was not successful; that her daughter kept him from hitting her. "He would grab a skillet or something and start after me and she'd grab him." As to these alleged acts of cruelty, the record contains no corroboration of plaintiff's testimony. Defendant denied striking his wife at any time on August 15. He testified:

"A. Never struck my wife in my life. Never."

In further direct examination, the following question was asked:

"Q. And directing your attention to August 25, 1955, did you have occasion to strike your wife on that day?

"A. No, I did not.



"Q. Did you ever strike your wife at any time?

"A. No time. Never in my life."

As to the skillet episode, defendant's version is as follows:

"I have never tried to strike my wife. We have had a little argument. She pulled a knife one evening on me, and I did grab a skillet. My daughter was there then. That is the only time I remember when there was any chance of any bodily injury." In rebuttal, plaintiff testified, "I have never pulled a butcher knife or kitchen knife or threatened my husband." The above is a detailed recitation of the evidence in the case as regards the charge of cruelty.

To support the charge of cruelty, plaintiff relies on the case of *Berlingieri v. Berlingieri*, 372 Ill. 60. In that case, the evidence of the wife as to the acts of extreme and repeated cruelty was supported by the testimony of two other witnesses. In *Moore v. Moore*, 362 Ill. 177, our Supreme Court held that a decree granting the wife a divorce on the ground of cruelty and making certain disposition of property on account of equities in her favor should be reversed where the reviewing court is of the opinion that the chancellor's finding of equities is not sustained by the record. In that case, and in the case of *Trenchard v. Trenchard*, 245 Ill. 313, the Court held that, "Cruelty constituting ground for divorce under our statute means physical acts of violence, bodily harm or suffering, or such acts as endanger life or limb or such as raise a reasonable apprehension of great bodily harm."

In the instant case, the evidence of appellee was uncorroborated, although from her testimony her daughter was



present on different occasions. No bruises were shown any witnesses immediately, or at any time, after the alleged acts of cruelty. No doctor or nurse attended plaintiff. She went ahead with her work at her usual place of employment. Other than the testimony of appellee, the record is barren of any acts of cruelty. Defendant denied each and all of same. On the record before us, the decree of the circuit court granting appellee a divorce cannot be sustained.

There is a dispute between the parties as to the effect of the instrument, plaintiff's exhibit 1, dated July 13, 1951, which plaintiff contends constituted a property settlement between the parties, and which defendant contends was merely evidence of a loan of \$500.00 made by plaintiff to defendant during the time the parties were separated for a period of about two months during the summer of 1951.

The jurisdiction of a court hearing divorce matters depends on the grant of the statute and not upon its general equity powers. *Marcy v. Marcy*, 400 Ill. 152; *Anderson v. Anderson*, 380 Ill. 435; *Smith v. Smith*, 334 Ill. 370. There is no dispute as to the receipt of the \$500.00 mentioned in the exhibit. However, the instrument is not complete within itself. It was prepared by an attorney, Charles E. Mason, and was executed by defendant when both parties were present in said attorney's office. The attorney did not testify. The court sought further information as to the circumstances surrounding its execution, as appears from the following colloquy between court and counsel:

"The Court:     Where is Mr. Mason?



"Mr. Lidschin: He is ill, if your Honor please. He is home for about a week.

"The Court: Well, I'd like to find out from him. Tell him I'd like to find out what this transaction was. He wrote here, 'Five hundred dollars in full of all claims, by reason of any real estate or any other property.' I'd like to find out when that was put on there, and what it means. I will continue this matter until he can testify.

"Mr. Lidschin: There is no dispute about the money being paid.

"Mr. Moore: No, there is no dispute."

It is likely that on another trial the attorney Mason can and will testify as to the circumstances attending the execution of said instrument, and the purposes sought to be attained thereby.

The decree of the circuit court is reversed and this cause is remanded to the circuit court of Lake County for a further hearing upon the issues made by the pleadings and without prejudice to plaintiff to show the entire transaction between the parties in the attorney's office; and, in the event said instrument is found to be a loan only, then plaintiff may show her contributions to the purchase of the real and personal property accumulated by the parties.

Reversed and remanded.

*P. J. Concur.*

Dove, P. J. Concur



## Abstract

59-A

IN THE

101.42493





**JULIUS R. RICHARDSON**  
CLERK, PROTEMPORE  
Appellate Court Second District



JERMY SECOR, a Minor, by  
EDWARD SECOR, his father  
and Friend, and  
EDWARD SECOR,  
Plaintiffs-Appellees,  
vs.  
CHARLES HYDE,  
Defendant-Appellant.

Appeal from the  
Circuit Court of  
Kendall County

Dove, P. J.

On July 25, 1953, Jerry Secor, a boy about fourteen years of age, was riding his motor scooter in a southerly direction on State Highway 31 in Kendall County, Illinois. The defendant, Charles Hyde, was driving his automobile in a northerly direction on said road. The defendant Hyde attempted to pass two other cars which were ahead of him, and his car collided with the motor scooter of Jerry Secor. Jerry Secor was seriously injured, and he brought a suit in the Circuit Court of Kendall County by his father, Edward Secor, his next friend, to recover damages for his injuries. Edward Secor also filed a suit against Charles Hyde to recover damages that he had sustained through the collision of the boy's motor scooter and the defendant's automobile. The complaint charges numerous acts of negligence on the part of the defendant and alleges that the plaintiff was in the

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CLERK, DISTRICT COURT  
JULIUS R. RICHARDSON

exercise of due care and caution for his own safety just before and at the time of the collision.

The defendant filed an answer in which he denied all *the* material allegations of the complaint, including the averments that he was negligent in the operation of his automobile and that he was guilty of wilful and wanton misconduct which caused the plaintiff's injuries.

The case was tried before the court without a jury, and at the conclusion of the plaintiffs' case, the court dismissed the wilful and wanton counts of the complaint. After hearing all of the evidence the court announced that he found the defendant guilty and assessed the plaintiff Jerry Secor's damage at \$12,500.00 and Edward Secor's damages at \$8,500.00. The defendant filed motions for judgment notwithstanding the court's finding and also a motion for a new trial. The court overruled all the motions, then entered judgment in favor of Jerry Secor for \$12,500.00 and Edward Secor for \$8,500.00. It is from these judgments that the defendant has perfected an appeal to this court. The appellant does not question the amounts of the judgments, and in his abstract he does not set forth any of the plaintiff's injuries.

The evidence shows that Route 31 at the place where the collision occurred runs in a northerly and southerly direction and is one of the main-traveled highways in that community. Jerry Secor was the owner of a motor scooter, which he had purchased the day before the accident in question. He was employed at a store several miles north of where the collision occurred.



During the noon hour Jerry had used his motor scooter to go to his father's home, and sometime between twelve and two o'clock his father assisted him in putting lights on the motor scooter. Jerry had purchased these lights the same day. The lights were tested after they were put on and found to be in good working order. At about two o'clock Jerry used the motor scooter to go to the store where he was working, and along about nine o'clock in the evening another boy got the motor scooter that was parked behind the store and brought it around in front, and in doing so he turned on the lights and found them to be in working order. Along about nine-thirty p.m., Jerry and the other boy started south on Route 31. The other boy lived on the same road about a mile south of the store. Jerry then went on for a couple of miles, and he says that his lights were on and he was driving near the center of the southbound lane of traffic when the accident occurred. At or very near the place of the accident there is a gravel road running west from the paved highway. The defendant pulled his car out of the northbound lane of traffic with the intention of passing two other automobiles which he had been following for several miles. ~~as he~~ <sup>of his traffic lane and</sup> pulled out ~~he~~ had gone only a very short distance when he struck the motor scooter, and the plaintiff <sup>Jerry</sup> sustained the damages that he sued for.

There is very little, if any, dispute about most of the facts in this case, but the appellant strenuously insists that there were no lights on the motor scooter, and if there were any they were not visible to one approaching the motor scooter at

The first part of the paper is devoted to the study of the  
 properties of the function  $f(x)$  defined by the equation  

$$f(x) = \int_0^x \frac{1}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $f(x)$  is an odd function and  
 that  $f(x) \in (-\frac{\pi}{2}, \frac{\pi}{2})$  for all  $x \in \mathbb{R}$ . The second part  
 of the paper is devoted to the study of the function  

$$g(x) = \int_0^x \frac{t}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $g(x)$  is an even function and  
 that  $g(x) \in (-\frac{\pi}{4}, \frac{\pi}{4})$  for all  $x \in \mathbb{R}$ . The third part  
 of the paper is devoted to the study of the function  

$$h(x) = \int_0^x \frac{t^2}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $h(x)$  is an even function and  
 that  $h(x) \in (-\frac{\pi}{4}, \frac{\pi}{4})$  for all  $x \in \mathbb{R}$ .

The fourth part of the paper is devoted to the study of the  
 function 
$$k(x) = \int_0^x \frac{t^3}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $k(x)$  is an odd function and  
 that  $k(x) \in (-\frac{\pi}{4}, \frac{\pi}{4})$  for all  $x \in \mathbb{R}$ . The fifth part  
 of the paper is devoted to the study of the function  

$$l(x) = \int_0^x \frac{t^4}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $l(x)$  is an even function and  
 that  $l(x) \in (-\frac{\pi}{4}, \frac{\pi}{4})$  for all  $x \in \mathbb{R}$ .

The sixth part of the paper is devoted to the study of the  
 function 
$$m(x) = \int_0^x \frac{t^5}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $m(x)$  is an odd function and  
 that  $m(x) \in (-\frac{\pi}{4}, \frac{\pi}{4})$  for all  $x \in \mathbb{R}$ . The seventh part  
 of the paper is devoted to the study of the function  

$$n(x) = \int_0^x \frac{t^6}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $n(x)$  is an even function and  
 that  $n(x) \in (-\frac{\pi}{4}, \frac{\pi}{4})$  for all  $x \in \mathbb{R}$ .

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 function 
$$o(x) = \int_0^x \frac{t^7}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $o(x)$  is an odd function and  
 that  $o(x) \in (-\frac{\pi}{4}, \frac{\pi}{4})$  for all  $x \in \mathbb{R}$ . The ninth part  
 of the paper is devoted to the study of the function  

$$p(x) = \int_0^x \frac{t^8}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $p(x)$  is an even function and  
 that  $p(x) \in (-\frac{\pi}{4}, \frac{\pi}{4})$  for all  $x \in \mathbb{R}$ .

least five hundred feet away. The statute provides that every motorcycle upon any highway in this state during the period from sunset to sunrise shall carry one lighted lamp showing white light or light of a yellow or amber tint visible at least five hundred feet in the direction toward which the motorcycle is proceeding (Ill. Rev. Stat. 1953, chap. 95 $\frac{1}{2}$  sec. 200). This light need not be bright enough for the driver of the vehicle to be able to see five hundred feet in the direction he is going, but must be of sufficient strength so that when anybody approaches the motorcycle from the opposite direction it can be seen five hundred feet away.

Plaintiffs' exhibit Number 72 is a good photograph of the motor scooter, and it shows two lights on it. The plaintiff testified that each of these lights had two batteries and that the lights were three or four inches in diameter, fastened by a band and screws to the handlebar of his motorcycle and that both of them were lit before he and his boy friend left the store and were burning at the time of the accident in question; that after the accident, plaintiff observed that one light was still burning and the other broken as a result of the collision. He did not testify how far he could see ahead of these lights, but his evidence is that they were bright enough so that he could see to drive the motor scooter and "were focused out ahead of the motor scooter and down towards the road so they would shine in front of the motor scooter." They were new lights and new batteries, put on the motor scooter that day and plaintiff testified: "I tested the light fixtures when I put them on to determine whether or not they were operating and I found they worked perfectly."

least five hundred feet away. The evidence shows that every motorcycle upon any highway in this State during the period from August to October 1931 until now is required to

showing white light or light of a color of white light

within at least five hundred feet in the direction toward

which the motorcycle is proceeding (Ill. Rev. Stat. 1931, Chap. 282, sec. 600). This light must not be so dimly

for the driver of the vehicle to be able to see the motorcycle

from the distance of 500 feet, but such a light is not required

except when the motorcycle is proceeding in the direction toward

the oncoming direction it can be seen from the distance of 500 feet.

It is the duty of every driver of a motor vehicle

of the motor vehicle, and it is the duty of every driver of a

motor vehicle to show such light as is required by the law

and that the light must be shown in the direction of travel

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The defendant and a passenger in his car testified that they did not see any lights on the motor scooter when they pulled out to pass the other cars and that they had only gone a short distance when their lights picked up the motor scooter. Helen Halbesma testified on behalf of defendant that she was in a car accompanying her husband who was driving south on this road upon the evening in question and passed the plaintiff and as they did so she called to the plaintiff that he "had better get off the road until you get more light. We can't see you." This witness further testified that she saw no evidence of a tail light on the scooter and didn't recall seeing any lights coming from the front of it. The evidence is further that after the collision occurred people went up to where the plaintiff was lying with his motor scooter and that one of the lights was knocked off the motor scooter and the other one was burning, but focused straight up.

Quite a number of photographs were introduced by both parties showing the condition of the road at the place where the collision occurred and these photographs and the evidence discloses that as you go north on this road from where the gravel road intersects it and where the collision occurred, there is a slight curve. Plaintiff was driving his motor scooter at the rate of about thirty-five miles an hour and the defendant was driving his automobile at about the same rate. Traveling at this speed on this road with the curve as shown, it was necessary for defendant to accelerate his speed in order to pass the two cars in front of him and it would be quite difficult to see the motor scooter very far ahead.

The defendant was a resident in the city of New York  
that took his car and left it at the motor vehicle room  
that called out to him and then came back and took his  
only some a short distance from his home and then he  
later received. Being witness, I testified as to what I observed  
that the car was a red Chevrolet and that it was  
driven away on this date and that it was driven to  
within the vicinity of the car and the car was  
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That a number of witnesses were interviewed as  
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from the car.

Appellant does not seriously contend that the lights were not burning on this motor scooter at the time of the collision, but his argument is that the lights were not of sufficient strength to be seen at least five hundred feet away.

Appellees argue that it is immaterial whether these lights were visible five hundred feet away from the motor scooter, as the evidence is that defendant did not attempt to pass the other cars until he was within one hundred feet of the motor scooter and that under all the conditions as shown to have existed at the time of the collision, if, the lights of the motor scooter were not visible five hundred feet, that would not be the proximate cause of plaintiff's injuries. The law is that the violation of a statute will not defeat a recovery, unless the violation, considered in connection with all the other facts and circumstances surrounding the case, establishes, first, that the plaintiff was negligent and, second, that such negligence proximately contributed to the injury. (Miller v. Burch, 254 Ill. App. 387, 396)

The issues made by the pleadings in this case were tried before the court without a jury. The findings of the court, therefore, must be given the same effect and weight as though the case had been tried before a jury and unless this court can say that these findings are manifestly against the weight of the evidence the judgment should be affirmed. The trial court had the advantage of hearing and seeing the witnesses testify and knew their interest in the result of the suit and, after reading the record, it is our conclusion that the findings and judgment of the trial court are sustained by the evidence and that judgment should be affirmed.

Judgment Affirmed.

*Crowley J. Conners,*  
*Ernest J. Conners,*

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## Agenda 10

10 TA. 28

DAVID JACOBSON, a minor, by  
Florence M. Jacobson, his mother  
and next friend, and  
FLORENCE M. JACOBSON,

## Appellants

VS.

Appeal from Circuit  
Court of Winnebago  
County.

CENTRAL ILLINOIS ELECTRIC &  
GAS COMPANY, an Illinois  
corporation,

Appellee

EOVALDI, J.

This is an action at law by David Jacobson, a minor, by Florence M. Jacobson, his mother and next friend, and Florence M. Jacobson, individually, for the recovery of damages occasioned by the injury to David Jacobson, a 7½ year old child, when he was struck by a bus owned and operated by the defendant company, and driven by its employee, Leonard Snyder.

The amended complaint is in two counts: count I is on behalf of David Jacobson, and seeks recovery for injuries suffered by him in the accident, which said injuries were alleged to have been the proximate result of the negligence of the defendant, acting through its said agent and servant, in the operation of its bus on streets which were covered with ice and snow; count II is on



behalf of Florence M. Jacobson and seeks recovery by her, as the mother of David Jacobson, for the amounts expended by her for medical care and treatment in an endeavour to cure the said David Jacobson of his injuries occasioned as a direct and proximate result of the alleged negligence of the defendant, acting through its said agent and servant. The amount of the ad damnum in count II was \$420.45.

The case was tried by a jury which returned a verdict in favor of David Jacobson as to count I in the amount of \$7500.00 and in favor of Florence M. Jacobson as to count II in the amount of \$1500.00. The plaintiffs filed motion for new trial, and the defendant filed motions for new trial and for judgment notwithstanding the verdict.

The trial court granted both the plaintiffs' and the defendant's motions for new trial and also granted the defendant's motion for judgment notwithstanding the verdict. The plaintiffs have appealed from the granting of defendant's motion for judgment notwithstanding the verdict and motion for new trial, and the defendant has appealed from the granting of plaintiffs' motion for new trial.

The plaintiffs' theory is that the trial court should have denied the defendant's motion for judgment notwithstanding the verdict inasmuch as the defendant's bus driver was fully aware of the icy and slippery condition of the street, and that with this abundant knowledge of the treacherous icy condition of the street, there was ample evidence of negligence on the part of the defendant's bus driver in driving his bus at a speed and in such a manner as under the circumstances was unsafe. Furthermore, it is plaintiffs' theory that there was sufficient evidence to go to the jury as to whether the defendant's bus driver had sounded



his horn, and if not, whether said failure was negligence and was a proximate cause of the injuries to the plaintiff, David Jacobson. The plaintiffs further assert that the trial court properly granted them a new trial because of improper prejudicial testimony of defendant's witnesses, because of improper prejudicial remarks by the trial judge, because of improper striking of testimony of one of plaintiffs' witnesses, because of the court's improper ruling in not allowing one of the plaintiffs to exhibit his injury to the jury, and because of improper prejudicial instructions given by the court on behalf of the defendant.

The defendant's theory of the case is that the trial judge properly granted the motion for judgment notwithstanding the verdict because of the absence of evidence fairly tending to prove negligence and proximate cause, and because the plaintiffs' proof affirmatively established due care on the part of the defendant. The defendant's further theory is that the court properly allowed its motion for new trial because of the excessive verdict of \$1500.00 returned under count II which only sought \$420.45, and because of error in giving certain of plaintiffs' instructions.

The facts in the case, as shown by a careful examination of the record, are substantially as follows: On November 29, 1950, at about 8:30 A. M., David Jacobson, one of the plaintiffs, was with his two sisters and a brother at the intersection of 18th Avenue and 11th Street in Rockford, Illinois. The children were on their way to school and were waiting for the bus operated by the defendant, being driven by its employee, Leonard Snyder. David Jacobson was leaning against a telephone pole located five feet south of the south curb of 18th Avenue and twenty-four feet west of the west curb of 11th Street. The bus approached traveling



east on 18th Avenue, which at that point is slightly crowned, and on the morning of the accident was covered with ice and snow and was extremely slippery both at the point of the accident and for a half block west. The witnesses described the slippery condition variously as being extremely slippery, a glare of ice, slippery due to ice and rain, and slippery due to ice covered over with a light layer of snow, but all of the witnesses agreed that the area of the accident, and for a considerable distance to the west, was very slippery. The south curb of 18th Avenue adjacent to the point of the accident was obscured and covered over with ice and snow, and the gutter of the curb was filled up with ice and snow.

Leonard Snyder, the bus driver, had been an employee of the defendant for more than four years and had driven this particular bus route on many occasions. He had reported for work on the morning in question at about 5:30 A. M. and had started his first run on this route at 6:00 A. M. When he started to drive his bus that morning, the condition of the highways and streets was icy and snowy and the condition of the surface was slippery. It took him about an hour to make the first complete round. He commenced his second round about 7:30. On the second round he arrived at the intersection of 18th Avenue and 7th Street, which is about four blocks west of the intersection of 18th Avenue and 11th Street where the accident occurred, at about 8:30. In trying to bring his bus to a stop at 18th Avenue and 7th Street, he slid thirty or forty feet. He then proceeded east on 18th Avenue. When he approached the intersection of 18th Avenue and 11th Street he saw people standing at the bus stop. When the bus was 100 to 125 feet west of the intersection, the driver applied his brakes to stop the bus but instead of stopping, the bus



started sliding, so he immediately fanned his brakes, alternately applying and releasing the same. That procedure failed to stop the bus and it continued to slide forward and to the right toward the curb, even though the driver continued to fan his brakes up to the time of impact. About six feet from the pole, the right wheels of the bus went up over the curb and hit the telephone pole, causing an indentation on the right hand corner of the front bumper of the bus. The plaintiff, David Jacobson, was struck by the bus and was either pinned by the bus against the pole or was beneath the bumper of the bus, so that the bus had to be backed away from the pole before he could get up.

The driver testified that he blew his horn several times within the last fifty feet west of the telephone pole. Plaintiff, David Jacobson, and Jeanene Jacobson, one of his sisters, testified that they did not hear the horn, as did a fireman who was across the street inside a fire station when the accident occurred. The driver also testified that on the previous round trip which he had made the same morning the streets were icy and slippery and that there was ice and snow in the immediate vicinity of 11th Street and 18th Avenue, and such area was in practically the same condition on the first as on the second trip.

In the above state of the record, the trial court erred in granting the motion for judgment notwithstanding the verdict, as said motion presents the single question whether there is in the record any evidence which, standing alone and taken with all its intendments most favorable to the party resisting the motion, tends to prove the material elements of his case. *Wiik v. Hagen*, 410 Ill. 158, at p. 161; *Seeds v. Chicago Transit Authority*, 409 Ill. 566; *Lindroth v. Walgreen Co.*, 407 Ill. 121, at p. 130; *Gorczynski v. Nugent*, 402 Ill. 147, at p. 156; *Weinstein v. Metropolitan Life Ins. Co.*, 389 Ill. 571, at p. 576. We are not



concerned with the weight or credibility of the evidence, but only with the narrow question whether there is any evidence, together with all reasonable inferences to be drawn therefrom, which would justify submission of the case to the jury. *Lindroth v. Walgreen Co.*, supra, at p. 130. In passing on a motion for a judgment notwithstanding the verdict, the court must consider all the evidence with all reasonable inferences therefrom in the aspect most favorable to the party against whom the motion is directed, and all contradictory or explanatory circumstances must be rejected. *Masters v. Central Ill. Electric & Gas Co.*, 7 Ill. App. 2d 348; *Baker v. City of Granite City*, 311 Ill. App. 586.

From the evidence in this case it appears that the driver of defendant's bus was fully aware of the icy condition of the street and that he failed to bring his bus under control when stopping at this particular bus stop. There is a direct conflict in the testimony as to whether or not he blew his horn as a warning after he saw that the bus would not stop. Taking the evidence in the light most favorable to the plaintiffs in this case there are sufficient facts from which the jury could find the defendant, acting through its agent and servant, guilty of negligence, which negligence was the proximate cause of the plaintiff's injuries.

In his memorandum of decision granting defendant's motion for judgment notwithstanding the verdict, the trial judge reached the conclusion that the ice on the roadway was the proximate cause of the injury and not any wrongful act on the part of the defendant. The defendant has adopted this position on appeal and relies, as did the trial judge, on the case of *Berg v. N. Y. C. R. R. Co.*, 391 Ill. 52, in which case the facts concerning the slipperiness



of the road, and the efforts of the vehicle driver to control his vehicle on ice, are similar to the instant case. In that case an auto had stopped at a state highway about 376 feet from a railroad crossing and then moved toward the crossing at 20 or 25 miles per hour. When 76 feet from the crossing, the car driver saw an approaching train. He immediately applied the brakes and tried to turn his auto to his right so as not to cross the tracks. The brakes held but the wheels skidded on the ice. The driver was unable to turn, and after skidding 30 or 35 feet in the direction of the crossing, he undertook to cross ahead of the train. The jury found for the plaintiff, a passenger in the car, against the railroad. The defendant's motion for judgment notwithstanding the verdict was denied. On appeal, the Appellate Court reversed without remanding, and the Supreme Court affirmed the judgment of the Appellate Court. In deciding the case on the point of intervening cause, the Supreme Court, p. 65, stated:

"Graves's (the driver) evidence describing his efforts to avoid the collision either by stopping the automobile or turning it from the street leaves no room to doubt that it was the ice on the roadway that rendered his efforts futile. There is no evidence which casts doubt upon the mechanical condition of the brakes or the sufficiency of Graves's effort to have stopped or turned the automobile had it not been for the ice. Thus the ice on the roadway became a superseding and intervening cause, and the injury of Berg was the culmination of the events produced by it. The sequence between defendant's wrongful act and Berg's injury was not continuous and unbroken. Since Graves and Berg saw the train when they were yet a distance where the automobile could have been stopped or turned from its course and the collision avoided had it not been for the ice, it is obvious that the two causes, that is, defendant's wrongful act and the condition of the street, were wholly unrelated in their operation. They were not concurrent, and there is no basis for an inference that the wrongful act created a condition which made the injury possible. \* \* \* The undisputed facts lead to the conclusion that the icy condition of the street was the proximate cause of the injury and not defendant's wrongful act. Under such circumstances there was no question of fact for the jury."



The plaintiffs' contention is that the instant case is distinguishable from the Berg case in that the driver here was fully aware of the icy and slippery condition of the streets. The testimony in the Berg case is silent on that point. Here, a few moments before, and within about four blocks of the intersection at which plaintiff was injured, the bus driver, in trying to bring his bus to a stop, slid thirty or forty feet. Ordinarily the question as to when a negligent act is the proximate cause of an injury is one of fact for the jury, to be determined from a consideration of all the facts and attending circumstances. *I. C. R. R. Co. v. Siler*, 229 Ill. 390. There was sufficient evidence in this case to allow the jury to determine whether the defendant's driver was negligent in his operation of the bus under the conditions existing, and whether the events which followed his wrongful act extended in an unbroken sequence from the wrong to the injury, and whether the injury was the natural and probable consequence of the wrongful act.

The trial court properly allowed the motions for new trial filed by both the plaintiffs and the defendant. In reviewing an order of the trial court granting a new trial where the question of the weight of the evidence is involved, the reviewing court will not disturb the order in the absence of an affirmative showing of a clear abuse of discretion. *Masters v. Central Ill. Electric & Gas Co.*, supra; *Warren v. Patton*, 2 Ill. App. 2d 173, 179; *Eckhardt v. Hickman*, 349 Ill. App. 474, 483; *Matkins v. Fenorsky*, 348 Ill. App. 125, 129; *Chapman v. Baltimore & O. R. Co.*, 340 Ill. App. 475, 499, 500. The matter of granting a new trial is in the sound discretion of the trial judge. *Parke v. Lopez*, 306 Ill. App. 486; *Ledferd v. Reardon*, 303 Ill. App. 300; *Josate v. Mack*, 302 Ill. App. 246. As was said in *Josate v. Mack*,



"Necessarily, the trial court should have the discretion to decide with finality whether a new trial is necessary in the interests of justice, as it is in his power to observe the multiplicity of situations as they arise during the progress of the trial and is in a better position to weigh the effect upon the jury and to judge whether or not substantial justice had been done."

On the question of the evidence, the trial judge must be accorded considerable discretion, and his judgment is accorded greater latitude than on questions of law. *Loucks v. Pierce*, 341 Ill. App. 253. The presiding judge in passing upon the motion for new trial has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility. The trial judge is in a better position than a court of review to weigh the evidence. The allowance or refusal of the motion is largely within the discretion of the trial court. His decision is subject to review, but it is commonly said that it will not be reversed except for a clear abuse of discretion. *Gavin v. Meter*, 278 Ill. App. 308; *In re Estate of Velie*, 318 Ill. App. 550; *Chapman v. Baltimore & O. R. Co.*, *supra*; *Matkins v. Fenorsky*, *supra*.

Other points are urged and argued by appellants which have merit, but as they will probably not recur upon another trial, they are therefore not discussed.

For the error of the trial court in granting the motion for judgment notwithstanding the verdict, said judgment is reversed, and the cause remanded for a new trial.

Dove, P. J. Concurs      Affirmed in part, reversed in part, and remanded.

*J. Crow*  
*Concurs.*



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Abstract

Gen. No. 10897

Agenda No. 12

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D., 1956

10 I.A. 585  
FILED  
JUN 23 1956  
JULIUS R. RICHARDSON  
CLERK, PROTEMPORE  
Appellate Court Second District

FANNIE G. BURKHOLDER, JESSE W. JOHNSON,  
and GEORGE W. GERDES, Individually and  
as Administrator, et al of the Estate of  
Fannie G. Burkholder, deceased,  
Plaintiffs-Appellants

vs.

Harry E. Burkholder, Arlene C. Danreiter,  
Individually and as Executrix of the  
Will of Charles P. Danreiter, deceased,  
Charles Le Roy Danreiter, minor, Socony-  
Vacuum Oil Co., Inc., Louise A. Connor,  
John A. Gerdes, Robert I. Gerdes, and  
Joseph S. Gerdes,  
Defendants-Appellees

Appeal from the

Circuit Court of

Whiteside County.

CROW, J.

This is an appeal by Jesse W. Johnson, one of the plain-  
tiffs, from the decree of May 31, 1955 in a partition proceeding,  
overruling his exceptions to a Master's Report of Findings of  
Fact and Conclusions of Law, relating to the accounting aspects  
of the case and the distribution of the proceeds of sale of the  
real estate involved, resulting from a Master's sale previously  
had, approving and confirming the Master's Report, finding cer-  
tain facts, stating the accounts between the parties, direct-  
ing that the plaintiff be paid \$13,006.99 from the proceeds of  
sale, subject to 1/5th of the court costs, and apportioning the

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JULIUS R. RICHARDSON

CLERK, PROTEMPORE  
Appellate Court Second District

cost  $4/5$ ths to the defendants and  $1/5$ th to the plaintiff.

The real estate concerned is situated in Sterling. One tract is improved with a two-story brick garage building. The other tract was originally improved with a large frame residence. Christian Burkholder, the common ancestor or source of title of the parties, owned the real estate. The residence property was his homestead. He died testate January 12, 1926, leaving surviving as his only heirs his wife, Mary, and their five children, Harry, Homer, Charles, Charlotte, and Alice. His will was admitted to probate in the county where the real estate is situated. So far as material, and as construed by a prior decree in the cause of October 2, 1951, hereinafter referred to, which was affirmed in *BURKHOLDER v. BURKHOLDER, et al.* (1952) 412 Ill. 535, the will gave a life estate in the real estate to Mary, his widow, and, subject thereto, a vested remainder in fee to his foregoing five children, as tenants in common. The language of the will need not now be set forth.

Homer Burkholder, one of the testator's sons and one of the above remaindermen, a resident of Iowa, died testate in 1935. By the residuary clause of his will, admitted to probate in Linn County, Iowa, in 1935, he left whatever interest he possessed in the property ( $1/5$ th as later determined) to his wife, Fannie G. Burkholder, the original plaintiff.

Mary Burkholder, the testator's widow, the life tenant, died January 3, 1938. Thereafter, in July, 1938, three of the remaindermen, Charles, and his wife, Charlotte, and her husband, and Alice conveyed their undivided interests ( $3/5$ th) to Harry Burkholder, one of the other remaindermen, who, having in the first instance his original  $1/5$ th under Christian's will, thereby became the owner of an undivided  $4/5$ ths, as a tenant in common.



After the death of Mary Burkholder, the life tenant, in January, 1938, the residence property remained vacant until June, 1938, at which time Harry Burkholder, and his family, moved into and thereafter continuously occupied it as his residence until November, 1946. He received no rent for any part thereof from anyone else. But, he paid nothing by way of rent from June, 1938 to November, 1946, on account of such use and occupancy to Homer, the other tenant in common of a 1/5th interest, or Fannie, his successor in interest. Harry paid the taxes, insurance, made some repairs, and made some small improvements thereon and thereto.

In November, 1946 Harry purported to sell (but, under the circumstances, actually sold only his undivided 4/5ths interest in) the house itself on that residence property and the northerly part of such property to Charles P. Denreiter, for a valuable consideration, who then moved the house to that northerly part and, thereafter, Denreiter converted it into an apartment building, making extensive improvements thereto, without the plaintiff's knowledge or consent. Denreiter received all the rents and paid all the expenses of and relating thereto after his acquisition in 1946.

About the same time Harry purported to sell the remaining or southerly part of that residence property to the Socony Vacuum Oil Co., although it is not entirely clear whether such sale was ever actually consummated. That portion has not since been improved, or rented, or used and occupied by Harry, or anyone else, and has remained vacant. Since 1946 Harry paid the taxes on that part.

The garage property was vacant at and after the death of Mary Burkholder and until December, 1938, at which time it was rented and it has always since been rented. In 1946 and



1947 Harry Burkholder made extensive improvements to that garage property, without the plaintiff's knowledge or consent. He has received all the rents and paid all the expenses of and relating to that property and has continued to retain his ownership of his undivided 4/5ths interest therein.

Harry Burkholder evidently erroneously believed, for some reason, that, following his acquisition in 1938 of the undivided interests of the remaindermen, Charles, Charlotte, and Alice, he was the sole owner of all this real estate and that there was no outstanding undivided interest in Homer Burkholder or his successors in interest.

Homer Burkholder's will was admitted to probate in the County where this real estate is located on September 2, 1947. On December 9, 1947, the plaintiff, Fannie G. Burkholder, Homer's widow and devisee of his interests herein, filed her complaint in this suit against the defendants, Harry Burkholder, Charles P. Danreiter, Socony-Vacuum Oil Company, and certain others, alleging that as sole devisee of her husband, Homer, she owned an undivided one-fifth interest in the property as a tenant in common, the remaining four-fifths interest being held by the defendant Harry Burkholder. The relief sought was partition and an accounting. Ultimately, on October 2, 1951, a decree construing the will of Christian Burkholder, <sup>ordering</sup> partition, and granting an accounting was entered. It found that the undivided 1/5th interest of Homer Burkholder in the property became indefeasible at his death and passed as a fee simple absolute under his own will to the plaintiff; that, because of constructive notice thereof given by the registration (filing, probating, and recording by the Clerk) of the Will of Christian Burkholder in



1926, the defendants were not bona fide purchasers without notice of the plaintiff's interest, and that, under the circumstances of this case, the defendant Harry Burkholder, one of the tenants in common, had not been in such adverse possession as to be adjudged the sole legal owner under the seven years' Statute of Limitations. Accordingly, the plaintiff Fannie was adjudged the owner of an undivided one-fifth interest in the property and Harry of an undivided four-fifths interest; partition was ordered and the accounting sought was granted. It is that decree which was affirmed in BURKHOLDER v. BURKHOLDER et al., supra.

After the affirmance by the Supreme Court of that decree of October 2, 1951 the Report of Commissioners in partition was filed, finding the real estate not susceptible of division without manifest prejudice to the parties in interest and appraising the same; a decree was entered confirming that report and ordering a sale thereof; the same were so sold on May 13, 1953, - the garage property for \$33,250.00, the apartment building property for \$18,000.00, and the vacant tract for \$13,500.00, - and a Master's Report of Sale to that effect filed; meanwhile, before and after the sale, hearings before the Master continued on the present accounting aspects of the case and, ultimately, culminated in the present Master's Report of Findings of Fact and Conclusions of Law, the plaintiff's objections and exceptions to which were overruled by, and which was approved and confirmed by, the present Decree of May 31, 1955 now under review.

This Decree finds and provides as to the garage property that since it was not rented from January 3, 1938 to December, 1938, the defendant Harry Burkholder should not be charged with rentals for that period; that he should be charged with gross



rents actually received from December, 1938 to May 13, 1953, the date of sale in partition, of \$24,800.00, is entitled to credit for disbursements for taxes, insurance, maintenance, and repairs of \$9993.52, is hence charged with \$14,806.48 net rents, and the plaintiff is entitled to 1/5th thereof, or \$2961.30. The plaintiff is not objecting to those parts of the Decree, but it should be observed, because of its possible bearing on another feature hereafter referred to, that the \$24,800.00 gross rents with which the defendant Harry is thereby charged and by which the plaintiff is thereby benefited are the gross rents actually received from that property both prior to and after his extensive improvements of 1946 and 1947, i.e., the plaintiff as to such rents is given the benefit of any increase there may have been therein due to such improvements. (The defendants did not object or except to that feature and have taken no appeal or cross appeal.) It further finds and provides that Harry expended \$13,846.04 on the improvements to that property; that because thereof the sale price, \$33,250.00, at the partition sale was enhanced \$14,500.00; that he is entitled to reimbursement from such proceeds of sale for such enhancement in sale price but not to exceed the \$13,846.04 actually expended on such improvements; and that the plaintiff is entitled to 1/5th of the sale price thereof, \$33,250.00, after deducting the \$13,846.04, or \$3880.79. On this appeal the plaintiff is objecting, having objected and excepted in the trial court, to those parts of the decree relating to such improvements and the reimbursement of Harry of \$13,846.04 for the enhanced sale price resulting therefrom.

The Decree further finds and provides as to the residence property (the house and part of the grounds of which in 1946 became the apartment building property) that for the period June 1, 1938 to November, 1946, when the defendant Harry occupied it as



a residence, he did not receive any rentals from anyone else for any part thereof and was not himself liable for rentals for such occupancy because he was a tenant in common rightfully in possession; that during that time he paid taxes of \$1563.98, repairs of \$1091.04, and insurance premiums of \$251.60, for which, since he was not chargeable with rent, he can claim no credit, and also a certain sum for improvements which, however, were solely for his benefit, did not enhance the sale value at the partition sale, and for which he is not entitled to any payment or reimbursement. On this appeal the plaintiff is objecting, having objected and excepted in the trial court, to those parts of the decree relating to the non-liability of Harry for rent for his occupancy thereof from June, 1938 to November, 1946. The Master's report, though finding, as does the Decree, that Harry is not liable for rents thereof for that period, found that were he so liable the reasonable rental value thereof for that period was \$4705.00, to which finding none of the parties objected or excepted. ✓ \*

The Decree further finds and provides as to the apartment building property (being the house and the northerly part of the former residence property which Harry purported to sell to Charles P. Danreiter in November, 1946) that Charles P. Danreiter, or his successors in interest, he having died meanwhile, should be charged with gross rents actually received after the removal of the house and its conversion to an apartment building to May 13, 1953, the date of sale in partition, of \$19,363.33, were entitled to credit for disbursements for taxes, insurance, maintenance, and repairs of \$9378.76, are hence charged with \$9984.57 net rents, and the plaintiff is entitled to 1/5th thereof, which would be \$1996.91. The plaintiff is not objecting to those parts of the decree, but again it should be observed, because of its possible



bearing on another feature hereafter referred to, that the \$19,363.33 gross rents which the defendants Charles P. Danreiter, or his successors in interest, are thereby charged and by which the plaintiff is thereby benefited are the gross rents actually received from that property after its conversion and the extensive improvements of 1946, - i.e., the plaintiff as to such rents is given the benefit of any increase there may have been therein due to such improvements. (The defendants did not object or except to that feature and have taken no appeal or cross appeal.) It further finds and provides that Charles P. Danreiter expended \$13,113.70 on the conversion and improvements in and to that property; that because thereof the sale price, \$18,000.00, at the partition sale was enhanced \$10,000.00; that that defendant or his successors in interest are entitled to reimbursement from such proceeds of sale for such enhancement in value of \$10,000.00; and that the plaintiff is entitled to 1/5th of the sale price thereof, \$18,000.00, after deducting the \$10,000.00, or \$1600.00. On this appeal the plaintiff is objecting, having objected and excepted in the trial court, to those parts of the decree relating to such improvements and the reimbursement of Danreiter or his successors in interest of \$10,000.00 for the enhanced sale price resulting therefrom.

The Decree further finds and provides as to the vacant southerly part of the former residence property that the plaintiff is entitled to 1/5th of the proceeds of sale thereof at the partition sale, \$13,500.00, less \$660.06 taxes paid thereon by the defendant Harry Burkholder since 1946. The plaintiff on this appeal is not objecting to those parts of the decree.

The summation of the matter, as indicated in the decree, is that the plaintiff is entitled to and is directed to be paid from the proceeds of sale \$13,006.99, being 1/5th of: the net rents of the garage property, the net sale price of the garage property



after deducting the \$13,846.04 enhancement in the sale price because of the improvements by the defendant Harry Burkholder, the net rents of the apartment building property, the net sale price of the apartment building property after deducting the \$10,000.00 enhancement in the sale price because of the improvements by the defendant Charles P. Darrsiter, and the net sale price of the vacant southerly part of the former residence property after deducting the \$660.06 taxes due the defendant Harry Burkholder, - all of the foregoing being subject to 1/5th of the court costs.

The plaintiff made a number of different objections, including the foregoing, to the Master's Report, which were overruled, and which stood as exceptions before the Court, and also made a number of additional exceptions before the Court which seemingly were never presented first as objections before the Master. Disregarding that unusual procedure, many of the plaintiff's original objections and exceptions and of the additional exceptions are not briefed, argued, and presented before us by the plaintiff on this appeal, and the plaintiff's record and abstract are probably insufficient properly to present some of them. Those that are not so briefed, argued, and presented to us are necessarily not before us, are considered waived, and can be given no consideration. As to the points that are briefed, argued, and presented the plaintiff does not urge that any of the findings of the decree or the Master's Report are factually against the manifest weight of the evidence, and hence we shall assume that they are not and that factually the decree and report are supported by the evidence. We may also observe that the present record, which the plaintiff presents here, begins simply with the filing September 19, 1952 of the mandate or Final Order of Affirmance of the Supreme Court



in BURKHOLDER v. BURKHOLDER et al., supra, and includes none of the pleadings, evidence, orders, or other proceedings in the cause prior to that time. Under the circumstances, we shall necessarily assume that the prior proceedings were entirely regular and sufficient, and no presumptions to the contrary, favorable to the plaintiff, can now be indulged. To the extent we have necessarily referred to matters not in the present record the references are from the opinion of the Supreme Court in that prior appeal, of which, of course, we take judicial notice.

The principal issues, as we understand them, are: (1) is x the defendant Harry Burkholder, a tenant in common of a 4/5ths interest, liable to account herein to Fannie Burkholder, the original plaintiff, or her successors, the tenant in common of the other 1/5th interest, for the reasonable rental value of his use and occupancy of the residence property from June 1, 1938 to November, 1946; (2) is the defendant Harry Burkholder entitled to reimbursement from the proceeds of sale of the garage property for the enhancement, \$14,500.00, in the sale price thereof due to his improvements thereto but in an amount not to exceed the \$13,846.04 actually expended on such improvements; and (3) - the same question, in principle, as (2), - is the defendant Charles P. Danreiter, or his successors in interest, entitled to reimbursement from the proceeds of sale of the apartment building property for the enhancement, \$10,000.00, in the sale price thereof due to his improvements thereto.

Before discussing those principal issues, however, there are certain preliminary matters that may be first determined. In his brief the plaintiff-appellant, who is an attorney, says the Court overruled his motion for an order reimbursing him for \$761.50 of necessary expenses incurred in the presentation of this suit for his client, the original plaintiff Fannie G. Burkholder.



The only references we can find to that in the present record are that on May 7, 1955 he filed a verified itemized list of expenditures in that amount, most of which appear to be for travelling and other out of pocket expenses, and do not appear to be elements of court costs as such; on June 7, 1955 he made a motion that the allowance thereof be reconsidered and an order entered directing them to be paid out of the funds held by the Master; and on July 5, 1955 the Court denied his motion for a corrective order. If that, or that in substance, is what the plaintiff-appellant refers to on this score, the subject is not presently before us. Under the present notice of appeal the only matter before us is the Decree of May 31, 1955, which says nothing whatever about this other matter, one way or the other.

In his brief the plaintiff-appellant also says the Court ruled that he, Jesse W. Johnson, is not a proper person to be made substitutional plaintiff herein in place of Fannie G. Burkholder, deceased, the original plaintiff. We do not so understand the present record. Fannie G. Burkholder, the original plaintiff, having died November 17, 1952, on the present plaintiff-appellant's suggesting her decease and presenting an assignment of April 6, 1951 by her to him of her rights in the properties and cause of action, an order was entered December 31, 1952 making him the sole plaintiff. Later, on February 10, 1953, by other orders, George W. Gerdes, individually, and as administrator C.T.A. of the estate of Fannie G. Burkholder, deceased, - he being one of her heirs, - was also made a plaintiff, the plaintiff-appellant's assignment was modified so as to assign to him only such interest as he has as a claim for and on account of attorney's fees, and it was said he should not be the sole plaintiff. Later on June 8, 1953 an order was entered that the plaintiff-appellant, under his agreement with Fannie, was entitled to



1/3rd of the distributive share in the Master's hands payable to her estate, the Master was directed so to pay such to him upon distribution, and it was ordered that he have a lien on such funds to that extent. On May 31, 1955, the same day the Decree now before us was entered, but by a separate docket order, the Court denied a Motion by George W. Gerdes to be substituted as party plaintiff, and said that, though he was a proper party for that purpose and the present plaintiff-appellant was not a proper party for that purpose, nevertheless, the substitution of the present plaintiff-appellant having been made more than three years previously by another Judge, it would not then be disturbed. Under the circumstances, we do not perceive what the plaintiff-appellant has to complain of in this respect. The Judge's comment May 31, 1955 that he was not a proper substituted party plaintiff, without some official judicial action in that regard, does not appear to affect the matter or hurt the plaintiff-appellant. As matters now are, as we understand it, he appears to be a plaintiff, though presumably not the sole plaintiff, - George W. Gerdes, individually, and as administrator C.T.A. of the estate of Fannie, being the other plaintiff (though that last docket order of May 31, 1955 may cast some doubt on whether Gerdes is still a plaintiff), - and none of the parties are complaining thereof or questioning the plaintiff-appellant's interest in the matter to the extent of his claim for fees. Further, that matter, also, is not before us for the same reason stated above, - the Decree of May 31, 1955, which is all that is before us, says nothing about the matter of the plaintiff-appellant being a plaintiff, one way or the other.

The defendant-appellee Harry Burkholder says in his brief that the question of the right of the defendants to reimbursement for improvements to the extent such enhanced the sale prices at the partition sale is not now before us because on March 19, 1954



an order was entered on a petition of the plaintiff-appellant for distribution, and the defendant's answers thereto, denying the petition, and finding, inter alia, that the defendant Harry acted in the mistaken but bona fide belief that he was the sole owner when he made improvements, that the costs of the improvements to the extent such enhanced the value of the properties should be deducted from the sale prices and allowed the respective defendants, and that since no figures were then available, no order of distribution could then be entered. The plaintiff-appellant did not seek to appeal from that order, and the defendant says the statutory time to appeal therefrom is now passed, and he asks in his brief that the present appeal from the Decree of May 31, 1955 be dismissed as to that question. The proper manner of calling such a subject to the attention of this Court and requesting action thereon is by a motion to dismiss the appeal, pursuant to Rule 5, Motions, and that having not been done we shall not consider the matter. Furthermore, it seems perfectly clear that the order of March 19, 1954 was not a final, appealable order in any event, but interlocutory only in character, and it does not preclude the plaintiff or the other parties or the Courts from considering the question as to such improvements. The Decree of May 31, 1955 is a final decree, does definitely, and finally, determine the question in the trial court, the plaintiff's notice of appeal from that Decree is unquestionably in proper time, and that question is, therefore, properly before us for determination.

As to the first principal issue, then, we think the defendant Harry Burkholder, a tenant in common of a 4/5ths interest, is liable to account herein to Fannie Burkholder, the original plaintiff, or her successors, the tenant in common of the other 1/5th interest, for the reasonable rental value of his use and



occupancy of the residence property from June 1, 1938 to November, 1946.

CH. 76, ILL. REV. STATS., 1955, par. 5, provides that:

"When one or more joint tenants, tenants in common or co-partners in real estate, or any interest therein, shall take and use the profits or benefits thereof, in greater proportion than his or their interest, such person or persons, his or their executors and administrators, shall account therefor to his or their co-tenants jointly or severally."

That statute was in effect during all the time herein concerned. It was added to Chapter 76 in 1935: LAWS, 1935, p. 936. It is substantially the same as Section 1 of former Chapter 2 of the former Revised Statutes, CH. 2, SMITH-HURD REV. STATS., 1933, par. 1, being a part of the Act of March 20, 1874 in regard to the action of account, and a similar predecessor statute has been in effect since 1845 and perhaps earlier. Chapter 2 itself was repealed in 1935: See CH. 2, ILL. REV. STATS., 1955.

The defendant Harry Burkholder, a tenant in common of 4/5ths, has as to that property during that period taken and used the benefits thereof by his use and occupancy of the whole, in, necessarily, a greater proportion, to the extent of 1/5th, than his interest, and he is liable to account therefor to Fannie Burkholder, the original plaintiff, or her successors, his co-tenant in common. The right under the present statute and its predecessors of a co-tenant to compel an accounting for the reasonable rental value of real estate from another co-tenant who has taken and received, by use and occupation, more than his share of the benefits is definitely settled; no demand by the co-tenant seeking the accounting is necessary; no ouster or refusal by the other co-tenant to permit joint occupation is necessary; and the accounting may be done and had in a partition suit: CLARKE v.



CLARKE et al. (1932) 349 Ill. 642; COOTER et al. v. DEARBORN et al. (1886) 115 Ill. 509; WOOLLEY v. SCHRAEDER et al. (1886) 116 Ill. 29; MCPARLAND et al. v. LARKIN (1895) 155 Ill. 84; DINSMOOR v. ROWSE (1904) 211 Ill. 317; SHARP v. SHARP et al. (1928) 328 Ill. 564.

The defendant-appellee urges that he is not so liable until a demand has been made by the other co-tenant, or there has been an ouster or refusal by him to permit joint occupation, and there must be something more than mere occupation by one tenant in common and a forbearance to occupy by the other. The statute contains no such conditions or provisions. The principal and most recent case he cites is COOPER v. MARTIN (1923) 308 Ill. 224, which, in part, does support his view, but we believe that what the Court said in the later case of CLARKE v. CLARK et al., supra, p. 648-649, is a sufficient answer to that:

"The appellant contends that the chancellor erred in entering a provisional decree for an accounting because no demand for rent has ever been made. In support of this contention COOPER v. MARTIN, 308 Ill. 224, is cited. It is there said that the co-tenant is not liable to account for the rental value of premises, or any part of it, until a demand is made by a co-tenant or co-tenants or there has been an ouster or refusal to permit joint occupation. At common law such was the rule, but it has not been the rule in this State since 1845, or perhaps an earlier date. Section 1 of chapter 2 of the Revised Statutes, entitled 'An act in regard to the action of account,' provides that 'where one or more joint tenants, tenants in common or coparceners in real estate, or any interest therein, shall take and use the profits or benefits thereof, in greater proportion than his, her or their interest, such person or persons, his, her or their executors and administrators, shall account therefor to his or their co-tenant, jointly or severally.' It was held in CROW v. MARK, 52 Ill. 332, that an action of account was not an exclusive remedy but a bill in chancery may be maintained to compel a co-tenant to account for profits and benefits which a co-tenant has taken and used in greater proportion than his share. The statute of Illinois is similar to the statute of 4 and 5 Anne, (chap. 16), which provided that actions of account may be brought by a tenant in common against another, as bailiff, for receiving more than comes to his share or proportion. The history of the enactments upon this subject is reviewed in WOOLLEY v. SCHRAEDER, 116 Ill. 29, where



it is said that our own act is broader than the statute of Anne, and by express terms a tenant may be required to account to his co-tenant for benefits as well as profits which he has taken or used in excess of his share. The cases of MCPARLAND v. v. LARKIN, 155 Ill. 84, and DINSMOOR v. ROUSE, 211 Id. 317, approved the holding in WOOLLEY v. SCHRADER, supra. It does not appear that our statute or the prior holdings of this court were brought to the attention of the court in COOPER v. MARTIN, supra. The right of a co-tenant to compel an accounting from another co-tenant who has received more than his share is definitely settled, and the chancellor committed no error by decreeing an accounting in this case, provided partition of the premises is not made and a sale is ordered."

As to the other cases the defendant cites, in BOLEY v. EMBUTIC (1887) 120 Ill. 192, although the Court said that to render one tenant in common liable to another for rent or use and occupation there must be something more than occupancy by one and forbearance to occupy by the other, the tenant in common out of physical possession did, in fact, there recover against the other tenant in common the reasonable rental value of his part which the defendant used and occupied. In ANGALO et al. v. ANGALO et al. (1893) 146 Ill. 629, the Court recognizes the principle, under the statute, that the liability of one co-tenant to account to another may arise either from receiving from a third party more than his share of the rents and profits, or from appropriating to his use more than his proportion of the common estate, but the bill there by one tenant in common against another for rents and profits or for use and occupation was fatally defective for so many different reasons that no clear cut principle at variance with our views can be derived therefrom. In CHAPIN et al. v. FOSS (1874) 75 Ill. 280, the Court observes that to render one co-tenant liable to another for rent for use and occupation there must be something more than occupancy by one and forbearance to occupy by the other, but in that case the co-tenant out of physical possession did,



in fact, recover rent for the use of her portion on the basis of an express or implied landlord-tenant relationship. CHENEY v. RICKS et al. (1900) 187 Ill. 171, which is the only case cited in the Master's Report herein on this point, held certain tenants in common in actual physical possession liable to the other tenant in common who was out of physical possession for rents and profits actually received by them but not for the rental value of the real estate where they had not ousted the other co-tenant, although the Court recognized the principle that the liability of one co-tenant to account to another may arise either from receiving from a third party more than his share of the rents and profits, or from his appropriating to his use more than his proportion of the common estate. To whatever extent those cases and COOPER v. MARTIN, supra, may seem to be at variance with the present statute, CH. 76 ILL. REV. STATS., 1955, par. 5, or its predecessor statutes, the statute, of course, must control, and, the most recent of those cases, aside from COOPER v. MARTIN, supra, already dealt with, being CHENEY v. RICKS et al., supra, we believe the later cases of CLARKE v. CLARKE et al., supra, DINSMOOR v. ROWSE, supra, and SHARP v. SHARP et al., supra, as well as the other earlier cases of WOOLLEY v. SCHLADER et al., supra, MCPARLAND et al. v. LARKIN, supra, and COOTER et al. v. DEARBORN et al., more accurately express the law.

Accordingly, that defendant is chargeable with the reasonable rental value of such property during that period, which the Master has found to be \$4705.00, gross, to which finding none of the parties have objected or excepted, and is, of course, entitled to credit for payments he made for taxes \$1563.98, repairs \$1091.04, and insurance of \$251.60, totalling \$2906.62 of credits, to which findings also none of the parties have objected or excepted, and which total credits, deducted from the \$4705.00 gross reasonable rental value, leaves \$1798.38, net rent, for which he is account-



able herein, and 1/5th thereof, to which the successors in interest of Homer Burkholder and Fannie Burkholder would ordinarily be entitled, is \$359.67, subject to what we hereinafter state. To the extent the present Decree does not so charge that defendant and make such additional allowance it must be reversed and the cause remanded and, as we would ordinarily order, with directions to enter an amended or supplemental decree giving effect thereto and allowing the successors in interest of Homer Burkholder and Fannie Burkholder such additional amount of \$359.67 against the defendant Harry Burkholder, subject, however, to the other terms of the present decree as to costs and other matters. But, inasmuch as George W. Gerdes, as administrator C.T.A. of the estate of Fannie Burkholder, deceased, one of the plaintiffs, and the party to whom the distributive share of Fannie Burkholder passes, as we understand it, subject to the rights of Jesse W. Johnson, plaintiff-appellant, for fees, has not joined in this appeal but has filed a statement herein indicating that he is satisfied with the decree below, that particular plaintiff is not entitled to any benefit of this partial reversal, and the present Decree will, accordingly, to the extent of its failure to allow the foregoing additional amount of \$359.67 to the successors in interest of Homer Burkholder and Fannie Burkholder and against the defendant Harry Burkholder, be reversed and the cause remanded, with directions to enter an amended or supplemental decree giving effect thereto but only insofar as the interests of Jesse W. Johnson, plaintiff-appellant, are concerned as the assignee of and to whom 1/3rd only thereof is payable, in addition to any other amounts previously found due him by the Court below, on account of his fees, subject, however, to the other terms of the present decree as to costs and other matters.



As to the other principal issue, we think the defendant Harry Burkholder is entitled to reimbursement from the proceeds of sale of the garage property for the enhancement, \$14,500.00, in the sale price thereof due to his improvements thereto in an amount not to exceed the \$13,846.04 actually expended on such improvements, and that the defendant Charles P. Danreiter, or his successors in interest, are entitled to reimbursement from the proceeds of sale of the apartment building property for the enhancement, \$10,000.00, in the sale price thereof due to his improvements thereto.

Where real estate is owned by tenants in common and improvements are made by one tenant in common without the knowledge or consent of the others, compensation, if any, allowed for the improvements in a partition suit in equity should be estimated so as to inflict no injury upon the other co-tenant, and, if possible, if the real estate is susceptible of division in kind, the portion improved should be allotted to the one making the improvement but without taking into account in the respective valuations the value of the improvement, but if division in kind in that manner cannot be made then, upon proper proof, the tenant in common making the improvement may be allowed the increased value or sale price, if any, of the premises due to and caused thereby at the time of the partition sale, but not the cost, as such, of the improvement:

DAVID v. SCHLITZ et al. (1953) 415 Ill. 545. The earliest Illinois case to that effect appears to be LOUVILLE et al. v. LEHARD et al. (1844) 1 Gilm. 39, and others to the same effect are: GARDNER v. DIEDERICHS (1866) 41 Ill. 158; DEAN et al. v. D'ALLARA et al. (1868) 47 Ill. 120; COOTER et al. v. DEARBORN et al., supra; HOBLE v. TIPTON et al. (1905) 219 Ill. 182; HAPPE etc. et al. v. SZCZEPANSKI et al. (1904) 209 Ill. 88; BAYLEY et al. v. NICHOLES (1914) 263 Ill.



116; WANTERNACH v. STUDD et al. (1909) 240 Ill. 464; LURY et al. v. MERRILL et al. (1891) 42 Ill. App. 193; BARTHOLOMEW et al. v. BARTHOLOMEW (1916) 203 Ill. App. 510; cf. BEAL v. SCOTT et al. (1882) 12 Ill. App. 321.

But the plaintiff-appellant says the defendants Harry Burkholder and Charles P. Danreiter were not bona fide purchasers for value without notice of the outstanding undivided 1/5th interest in Homer Burkholder, or his successors in interest, calls attention to the language of the prior decree herein of October 2, 1951 to the effect that because of constructive notice thereof given by the registration of the will of Christian Burkholder in 1926 they were not bona fide purchasers without notice of the plaintiff's interest, which decree was affirmed in BURKHOLDER v. BURKHOLDER et al., supra, (though it may be observed the Supreme Court does not use that language in its opinion except in stating the terms of that decree), says the finding in the present Decree of May 31, 1955 to the effect that Harry acted in the mistaken but bona fide belief that he was the sole owner of the real estate is erroneous, and says that since they were not bona fide purchasers they cannot herein be reimbursed for such or any part of such improvements.

The plaintiff-appellant cites no Illinois cases in point to that effect where the real estate is owned by tenants in common and the question of the effect of and disposition as to improvements made by one tenant in common, without the knowledge or consent of the other, arises in a partition suit in equity. The principal Illinois cases he cites on this are CLARK et al. v. LEAVITT et al. (1929) 335 Ill. 184, BURKHOLDER v. BURKHOLDER et al., supra, being the prior appeal from the prior decree in this cause, and MCPARLAND et al. v. LARKIN, supra. The other Illinois cases he cites generally are to the effect, in varying dissimilar situations, that a grantee in a deed or conveyance of real es-



tate or an interest therein is chargeable with knowledge of any outstanding title or interest of which he has actual notice or has constructive notice from the record in the apparent chain of title, - REED v. EASTIN (1942) 379 Ill. 586, SMITH v. GRUBE (1949) 402 Ill. 451, CESSNA v. HULCE (1926) 322 Ill. 589, GRUNDIES v. REID (1883) 107 Ill. 304, BANK v. DAYTON (1886) 116 Ill. 257, DEAN et al. v. LONG et al. (1887) 122 Ill. 447, BLAKE et al. v. BLAKE et al. (1913) 260 Ill. 70, ROCKLAND v. JANKO KI (1950) 407 Ill. 263, - a fundamental and familiar principle, of course, of undoubted soundness, but which does not and the cases do not touch upon the particular problem here involved; or they deal with matters not appearing in this record and not involved at all on this appeal and, in part, already determined to the contrary in BURKHOLDER v. BURKHOLDER et al., supra, - AUDREWS v. FLOYD et al. (1923) 308 Ill. 559, BIGGINS v. DUFFICY (1914) 262 Ill. 26, DUNLAVY v. LOWRIE et al. (1940) 372 Ill. 622, AMES v. WITBICK (1899) 179 Ill. 453, MOGLOTHLIN et al. v. MCILVAIN et al. (1950) 407 Ill. 142, ALLEN v. ALLEN et al. (1920) 292 Ill. 453. CH. 3, ILL. REV. STATS., 1955, par. 235, to which the plaintiff-appellant also calls attention simply provides that an original will when admitted to probate shall, with the probate thereof, be recorded by the Clerk of the County Court in a book which shall remain in his custody, - which in this case merely means that the registration thereunder of Christian Burkholder's will in 1926 constituted constructive notice of the interests of Homer and his successors thereunder, - as determined in the prior decree herein and as affirmed by the Supreme Court, - which does not, however, answer the question as to these improvements here involved as between these tenants in common.



BURKHOLDER v. BURKHOLDER et al., supra, held and determined the titles of these parties and settled that matter; the matter of improvements by one of the tenants in common on the real estate was not there involved and the case did not mention or pass on that at all; and however significant and important to the matter of title the status of the defendants Harry Burkholder and Danreiter as bona fide purchasers or not may have been that does not mean that such has any bearing on the present problem at this state of the case. MCPHAILAND et al. v. LARKIN, supra, involved improvements made by the guardian of a minor tenant in common on real estate of which the guardian's wife was the other tenant in common, made without any authority of the Court in the guardianship proceedings, and the guardian was not allowed reimbursement therefor as against the minor, although even there the guardian and his wife were allowed to remove an old cottage which they had remodeled and improved, - because of its wholly different and special facts and circumstances that case has no application here. CLARK et al. v. LEAVITT et al., supra, held that a purchaser from a life tenant, who acquired no part of the fee simple title, who has constructive notice of the status of the life tenant's title and that the outstanding fee is entirely in someone else, is not entitled to reimbursement for improvements he makes during the lifetime of the life tenant as against the real owner of the fee in a sale proceeding after the life tenant's decease, - that if a purchaser in good faith and without notice of defects in title makes improvements on land belonging to another, he is generally allowed for reasonable improvements of a permanent character benefiting the estate, but if he has notice, constructively, of the condition of the title, i.e., that he is purchasing only a life estate and not the fee, he has no claim on a court of equity for reimbursement for such improvements. CLARK



et al. LEAVITT et al. did not involve improvements made by a tenant in common to real estate in which he has an undivided interest or title in fee as such tenant in common. It involved improvements made by one who had no title at all, or at best an estate per autre vie, which had expired by the decease of the original life tenant. DART v. HERCULES et al., (1870) 57 Ill. 446, also cited by the plaintiff-appellant, is another case analogous in principle to CLARK et al. v. LEAVITT et al., where a party who had no title at all and who had notice of the prior rights of another made some improvements, - again, no tenancy in common was involved, and it has no bearing on the present case.

In the present case the defendant Harry Burkholder was unquestionably a tenant in common of a 4/5ths interest, 1/5th under the will of Christian Burkholder and 3/5ths by conveyances from three of the other remaindermen, and the defendant Danreiter, or his successors, was unquestionably a tenant in common of a 4/5ths interest in a part of the real estate after Danreiter's purchase from Harry in 1946, regardless of and notwithstanding their constructive notice of Homer's outstanding undivided 1/5th. They did not own the whole fee - 1/5th was unquestionably outstanding in Homer Burkholder and his successors, - but they did have a 4/5ths interest and they were tenants in common to that extent. In legal contemplation, of course, they knew they were simply tenants in common and they knew an undivided 1/5th was outstanding in Homer or his successors, - which is all the extensive argument of the plaintiff-appellant, if it be admitted, as to their so-called bona fide character goes to establish, - but that makes no difference. We should assume that almost any tenant in common in actual physical possession, except perhaps in some unusual and hard to

and the Ministry of Education, it is not possible to

know in advance the exact number of students who will be enrolled in the various faculties of the University of Toronto in the year 1960. It is, however, estimated that the total number of students will be about 10,000.

The following table shows the estimated number of students in each faculty for the year 1960.

Faculty of Arts 3,000  
Faculty of Science 2,500  
Faculty of Engineering 2,000  
Faculty of Commerce 1,500  
Faculty of Education 1,000  
Faculty of Law 500

Another estimate of the number of students in each faculty for the year 1960 is given in the following table.

Faculty of Arts 3,500  
Faculty of Science 3,000  
Faculty of Engineering 2,500  
Faculty of Commerce 2,000  
Faculty of Education 1,500  
Faculty of Law 600

The following table shows the estimated number of students in each faculty for the year 1961.

Faculty of Arts 3,500  
Faculty of Science 3,000  
Faculty of Engineering 2,500  
Faculty of Commerce 2,000  
Faculty of Education 1,500  
Faculty of Law 600

The following table shows the estimated number of students in each faculty for the year 1962.

Faculty of Arts 3,500  
Faculty of Science 3,000  
Faculty of Engineering 2,500  
Faculty of Commerce 2,000  
Faculty of Education 1,500  
Faculty of Law 600

The following table shows the estimated number of students in each faculty for the year 1963.

Faculty of Arts 3,500  
Faculty of Science 3,000  
Faculty of Engineering 2,500  
Faculty of Commerce 2,000  
Faculty of Education 1,500  
Faculty of Law 600

The following table shows the estimated number of students in each faculty for the year 1964.

Faculty of Arts 3,500  
Faculty of Science 3,000  
Faculty of Engineering 2,500  
Faculty of Commerce 2,000  
Faculty of Education 1,500  
Faculty of Law 600

imagine case, knows by actual or constructive notice that he is simply a tenant in common and that someone else has an outstanding undivided interest. It is difficult to conceive of a tenant in common who would be a so-called bona fide purchaser in the sense the plaintiff-appellant uses the phraseology, having no notice, actual or constructive, of the existence or rights of his co-tenants in common. Such does not prevent his making improvements if he wishes to take the risks of perhaps never recouping the cost thereof or any enhancement, if any, they may cause in the value of the property. And, if he does so, regardless of his knowledge of his status, and then in a later partition suit where there is a sale the facts are established as to the improvements and that they did, in fact, enhance the sale price in a certain amount, he is entitled, so far as we are aware, to be allowed that enhancement in price or value therein caused thereby. He does not thereby recover the cost of the improvements, as such, - merely the enhancement, if any, in sale price or value due thereto. If there were no such enhancement he'd recover nothing on such account in such partition suit. The factor or element of that improver's being or not being a bona fide purchaser or having or not having that type of status, has no bearing whatever on the issue where the relationship involved is that of tenants in common, - regardless of how significant such inquiry would doubtless be if he were not a tenant in common and had no title at all in fee.

DAVID v. SCHLITZ et al., supra, LOUVALLE et al. v. MENARD et al., supra, and the other cases following it, referred to above, draw no such distinction between various types of tenants in common who may in partition be allowed or not allowed such enhancement in sale price due to such improvements as between tenants in common who have and those who do not have the status of a so-called bona fide purchaser, - that inquiry is, in such cases, simply an irrelevant, immaterial, and wholly academic in-



quity, - and the plaintiff-appellant has referred us to no Illinois case which in this respect does make such a distinction between types of tenants in common. In fact, in ELRY et al. v. MERRILL et al., supra, for what it may be worth, the observation is specifically made that even a tenant in common who makes his improvements as a so-called wrongdoer, without any authority and in his own wrong, is nevertheless so entitled to be allowed such enhancement in value or price due thereto if the proofs so show; and in HEPPE etc. et al. v. SZCZEPANSKI et al., supra, the tenant in common who made the improvements could hardly have been said to have made them in good faith, but there was no question as to her right, upon proper proof, to be allowed the enhancement in value or price due thereto, if any, although the proof thereof was not sufficient in that case; and in MCPHAIL et al. v. LARKIN, supra, where the guardian and his wife were certainly not in good faith they nevertheless were allowed to remove an old cottage which they had remodeled and improved. It must be kept in mind that this present case is not a separate suit by the defendants Harry Burkholder or Farnleiter, or his successors, to recover from Homer Burkholder, or his successors, the cost or proportionate part of the cost as such of the improvements done without his or their knowledge or consent, in which instance perhaps some other considerations might be involved, but it is a partition suit brought by Mennie, his successor, against them in which there has been a sale, and the question is not whether they can recover the cost as such of the improvements, but whether they may be allowed herein the proved and unquestioned enhancement in the sale prices resulting from such improvements. We think they may. The finding in the present Decree of May 31, 1955 that the defendant Harry Burkholder acted in the mistaken



but bona fide belief that he was the sole owner of the real estate when the improvements concerned were made is not necessary or significant to the present inquiry, and whether that finding be inconsistent or not with the prior decree of October 2, 1951, and erroneous or not, is immaterial, irrelevant, and academic, - if erroneous the error is not significant, prejudicial, or reversible.

To the extent and in the manner hereinbefore indicated the decree of May 31, 1955 is reversed and the cause remanded, with directions, as heretofore indicated, and in all other respects the decree is affirmed.

REVERSED and REMANDED, in part,  
with directions, and

AFFIRMED, in all other respects.

*Abner P. J. Conner*  
*Everald J. Conner*

The first thing I noticed when I stepped out of the car was  
 the cold. It was a sharp contrast to the warm blanket of the car.  
 The air was crisp and clear, and the sun was shining brightly.  
 I took a deep breath and felt a sense of peace. The world was  
 so beautiful, and I was so lucky to be here. I walked towards  
 the house, feeling a sense of purpose. The path was well-trodden  
 and led me straight to the door. I knocked and waited for a  
 moment. The door opened, and I was greeted by a warm smile.  
 I stepped inside and felt a sense of belonging. The house was  
 just what I needed.

The house was a simple, one-story building with a white picket fence.  
 The lawn was green and well-maintained. The house had a large  
 front porch with a white railing. The windows were framed in white.  
 The house was a perfect fit for my needs. I had everything I  
 needed to start a new life. The house was a great investment.  
 I was so lucky to find it.

The house was a perfect fit for my needs. I had everything I  
 needed to start a new life. The house was a great investment.  
 I was so lucky to find it.

House 6.9. 2026  
 2026. 6.9. 2026

OK.  
B.M.

Abstract

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General No. 10926

Appendix No. 5

IN THE

APPELLATE COURT OF ILLINOIS

FILED

JUN 27 1956

JULIUS R. RICHARDSON

CLERK, PRO TEMPORE  
Appellate Court Second District

SECOND DISTRICT

May Term, A. . 1956

10 I.A. 566<sup>2d</sup>

FLORENCE BRITSCH,

Plaintiff-Appellee,

vs.

VELDA SWANSON,

Defendant-Appellant.

Appeal from the  
Circuit Court of  
Henry County.

Dove, P.J.

About nine o'clock on the morning of March 24, 1954, Florence Britsch, the plaintiff, was driving her 1946 Chevrolet coupe in a westerly direction on East Park Street in the City of Daneseo. At the same time, the defendant, Velda Swanson, was driving a 1951 Hudson sedan in a southerly direction on Russell Street intending to turn west on East Park Street when she reached the intersection. At the intersection the cars came into collision, and on November 13, 1954, the instant complaint was filed by Florence Britsch to recover from the defendant for the injuries she sustained and the damage to her automobile resulting from said collision. Upon a trial by the court, without a jury, there was a finding and judgment for the plaintiff for \$5225.00, and defendant appeals.

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JULIUS R. RICHARDSON  
 CLERK, PROBATE COURT  
 Appellate Court Second District

The complaint, after alleging that the plaintiff was in the exercise of due care for the safety of herself and her property, charged that the defendant, upon the occasion in question, was operating her car at a speed in excess of twenty-five miles per hour in a residential district of the city and that the defendant failed to yield the right of way to the plaintiff's car which had already entered the intersection. The answer of the defendant denied these averments, and it is the contention of appellant in this court, first, that the evidence discloses, as a matter of law, that plaintiff was guilty of contributory negligence and, second, that the damages awarded plaintiff were excessive. It is, therefore, necessary for us to review the evidence.

The plaintiff testified that as she drove west on the right-hand side of East Park Street she was going ten miles per hour; that there were no other cars on East Park Street; that she saw the defendant's car in Russell Street before she (the plaintiff) got to the intersection. Continuing her testimony, she said: "I saw she (the defendant) was far enough away so I shifted gears and started up. As I came to the intersection and stopped the Swanson car was at the second house from the opposite end of the block, about 100 feet into the block. I looked where she was, looked in the opposite direction and by the time I looked back she was ready to hit me. I was then in the middle of the intersection. I tried to get away . . . but she hit my back fender, my right, rear fender was hit. At that time I was past the middle of the intersection - that part



of my car was on the west half of the street. . . . I was in second gear and not going much over 10 miles an hour when we hit. . . . When I observed the Swanson car it was going at a high rate of speed. I imagine she was going 40 to 50 miles per hour. Before the collision I observed Mrs. Swanson looking back. Her head was turned in the opposite direction. She was looking over her left shoulder. Mrs. Swanson was on the right side of the street. Her car stopped in the middle of the intersection. There was no other traffic on Russell Street at the time and no cars parked to interfere with the view. As this intersection is approached both from my direction and Mrs. Swanson's you would see a block." On cross-examination, in response to a question whether she stopped on the east side of the intersection before she entered it, she answered: "I was not actually out in the intersection itself. I saw the Swanson car approaching more than half a block away," and in reply to the question, "Did you conclude at that time that the Swanson car was coming at a rapid rate of speed?" she replied: "You don't notice when they are that far away. You don't judge how fast they are coming. You judge the distance, whether it will give you a safe distance to get across."

Velda Swanson, the defendant, the only other occurrence witness, testified that her car was in good driving condition upon the occasion in question and that it was a clear day and the streets were dry; that she met no cars as she proceeded south on Russell Street from her mother-in-law's home, which was two and one-half blocks north of the Russell and East Park Street intersection, and that she was alone and was going



down Russell Street to East Park Street and intended to turn west on Park Street. As abstracted, this witness continued: "I was going 15 or 20 as I approached the intersection with Park Street. As you approach the intersection there is a white house which sits quite far back on the corner to the left. There is no other obstruction and the visibility is quite good both ways. I saw Mrs. Fritsch's car on the corner as I had just started around the corner. I didn't see it before I reached the intersection. When I first saw it I had just begun to turn to the right. At that time Mrs. Fritsch's car was just coming through; at the corner of the intersection ready to come through. It was just at the intersection too. I don't know how much time elapsed between the time I first saw it and the time of the collision. It was a very short period of time. I would say she was going around 40 or 45. She did not stop when she entered the intersection. I stopped when I saw her car coming. I had just started around and she hit it. I stepped on the brakes. I was on my right hand side and she was on hers, as far as I know. I saw her as she was coming to the intersection. The part of my vehicle involved was just the left front fender, the headlight and the bumper on the corner. Mrs. Fritsch's back fender collided with my left front bumper. When I saw her she was looking over into that home and she didn't see me. I would say her back wheel went over my bumper. My car was about in the center of the intersection facing west when it stopped."



On cross-examination, the defendant testified: "I did not look back over my shoulder as Mrs. Fritsch testified. I said she was looking into the Catholic home on the south side of the road. Yes, she was looking to her left when I first saw her. At that time she was on the corner ready to come through the intersection. I did not see her approach the corner. I saw her up to it. I saw her car after the accident. It was not very far away from where we hit, just a few feet. It was lying on its left side. It was the right rear of the Fritsch car and the left front of mine that got hit." In response to questions by the court, the defendant stated that after the collision her car was standing on its wheels a trifle to the west of the center of the intersection headed west and that Mrs. Fritsch's car was against the curbing at the southwest corner of the intersection headed northwest; that there was a white house on the northeast corner of the intersection, a funeral home on the northwest corner, a school on the southwest corner, and a Catholic church on the southeast corner.

Counsel for appellant recognizes that all of the authorities are to the effect that findings of fact by a trial court in a case tried without a jury are entitled to as much weight as the verdict in a jury trial and that questions of conflicting evidence and the credibility of witnesses are resolved by an appellate court in favor of the successful party in the trial court and that the findings of the trial court will not be disturbed upon appeal unless they are clearly against the manifest weight of the evidence (Reese v. Laymon, 2 Ill. 2d 614, 624; Myers v. Krajefski, 134 N.E. 2d 277, 280) XXX. It is

S III. 26 614. 624; Myers v. Kraft, 124 N.E. 2d 177, 280)

also the law that a judgment of a trial court cannot stand if it is against the manifest weight of the evidence (Roberts v. Cipfl, 313 Ill. App. 373), and it is the duty of the appellate court to reverse under those circumstances.

In the instant case appellee testified she came to a full stop when she reached the intersection and before proceeding into it; that she shifted gears and proceeded at a low rate of speed. Appellant testified that appellee did not stop and entered the intersection at a high rate of speed and without looking. The trial court heard the testimony of both parties and gave credence to appellee's version of the occurrence, and in rendering the judgment which it did, the court must have concluded that appellee was in the exercise of due care for her own safety and that appellant was guilty of the negligence charged.

Counsel for appellant insist, however, that the only conclusion supported by the evidence is that both cars entered the intersection "at almost the same instant" and therefore under sec. 16, sub-par. (b), chap. 95 1/2 Ill. Rev. Stat. 1953, which provides that when two vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right, appellee was contributorily negligent, as a matter of law, in failing to yield the right of way to appellant. If the trial court accepted the version of the occurrence as detailed by appellee, the vehicles did not enter the intersection at approximately the same time, but appellee's car was well into

when the law that a defendant is a party to a crime is  
it is not the defendant's duty to prove his innocence  
but it is the duty of the prosecution to prove the  
guilt of the defendant beyond a reasonable doubt.  
If the defendant is found guilty, the law requires  
that he be punished. The punishment is not a  
reward for his crime, but a penalty for his  
crime. The punishment is not a punishment for  
the crime, but a punishment for the person who  
committed the crime. The punishment is not a  
punishment for the crime, but a punishment for  
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the person who committed the crime. The punishment  
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punishment for the person who committed the  
crime.

the intersection before appellant's car reached it. Upon the record we would not be justified in disturbing the findings of the trial court upon this question of fact.

It is also insisted that the damages awarded appellee are excessive. Appellee testified at length to the effect that after the accident she was hanging with her feet in the steering wheel; that she finally extricated herself, walked across the street to the funeral home, and from there a policeman took her to the hospital, where she was treated by Dr. Walters, and X-rays were taken and her ribs and chest were taped; that her chest, legs, arms, and shoulders were black and blue, and her nose and side of her face were swollen; that she was taken home and ice packs were put on her bruises. On April 13th she was returned to the hospital in Geneseo, where she remained eleven days and then transferred to the Public Hospital at Coline where she remained until June 24, 1954. As we read plaintiff's testimony, she had suffered ~~XXXXXXXXXXXXXXXXXX~~ from varicose veins in her leg about a year previous to this accident which had incapacitated her from working. Upon the day of the accident, however, she was on her way to Davenport intending to go back to work. According to her testimony, aside from varicose veins, her health had been perfect. This case was tried on June 9, 1955, and plaintiff testified she had not returned to work since the accident because she was unable to stand for any length of time; that her shoulder, elbow, and wrists still cause her pain, as well as her chest, hips, and leg; that she is hardly able to get into bed and scarcely able to hobble to



the bathroom. Officer Brownell, chief of police of the City of Geneseo, came to the scene of the accident shortly after it occurred, and he testified that the plaintiff told him that she was not hurt and he observed that she walked well. Dr. Walters, who examined her the day of the accident, testified that at that time her only symptoms were a bruised right thigh and pains in her shoulder and neck. Plaintiff testified she recalled that the policeman asked her if she was injured and that she told him her arm was hurt and that she was going to the hospital for x-rays. When she returned to the hospital in Geneseo, she was placed in traction to relieve a possible back injury and, when these treatments proved ineffective, she was referred to Dr. Robert Graham, an orthopedic surgeon, for study in order to determine whether there was a disc injury to her back. Dr. Graham testified that he found no bone involvement and that her back was essentially normal and that her only physical ailments were bruises, contusions, abrasions, and sprains, in addition to gallstones, and that the gallstones which he found were in no way related to the accident. Dr. Leo Gamburg, a psychiatrist, testified on behalf of defendant to the effect that he examined plaintiff on May 26, 1954, at the request of Dr. Graham and, based upon plaintiff's statements, he concluded that "she had ideas of unreality characterized by some persecutory feeling against certain people and a wrong interpretation of sensory feelings. I thought Mrs. Eritsch had a paranoid tendency. A person with



paranoid tendency is logical in reasoning except they be in on the wrong premise. They would not necessarily think a bruise was a fracture, but they might. I would say there is an unconscious rather than a voluntary tendency to exaggerate aches and pains. It is not malingering." Dr. Gamburg, further testified that plaintiff told him she had been in the East Moline State Hospital in 1944, 1945, and 1947, that the diagnosis was dementia praecox, catatonic type. The doctor further testified that such patients are never released as cured but only improved, and if such a person sustains injuries such as plaintiff received in this accident, there would be more mental reaction and emotion attached to such injuries than if a normal individual was so involved.

It was stipulated upon the trial that the damage to plaintiff's automobile was \$225.00, and the evidence is that the bill of Dr. Walters amounted to \$59.00, the bill at the Veneseo hospital was \$125.15, the bill of the Moline Public Hospital was \$737.83, and ambulance service amounted to \$11.60, all aggregating \$1164.58. The trial court fixed the damages of the plaintiff for the personal injuries which she sustained at \$5000.00 and her property damage at the stipulated sum of \$225.00 and rendered judgment for \$5225.00. There is evidence that prior to a year before plaintiff was injured she was employed as a hostess at Blackhawk Hotel and had been for a year or more and received \$239.00 a month for her services and had received \$43.00 per week when employed as a waitress and clerk, that she had recovered from her previous disability to the extent, at least, that she could resume working and was on her way to do so when injured.



Appellee has made no appearance in this court and has not filed any brief or argument. We have read the record as abstracted by appellant and considered counsel's argument and the authorities cited. The record discloses that at the conclusion of the introduction of the evidence the trial court took the case under advisement. It was peculiarly the trial court's province to appraise the evidence not only upon the questions of negligence and due care but upon the question of damages. Upon a review of the entire record, we are unable to say the trial court erred. The judgment of the Circuit Court of Henry County must therefore be affirmed.

Judgment affirmed.

*Crow J., Concur.*  
*Corvaldi J. Concur*

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George F. ...  
Charles F. ...

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A-35-10-1

General No. 10931

Agenda No. 8

IN THE  
APPELLATE COURT OF ILLINOIS

---  
SECOND DISTRICT  
---

10 I.A. 567

May Term, A.D. 1956

THE PEOPLE OF THE STATE  
OF ILLINOIS,

Defendant in Error,

vs.

ALEX P. PETERS,

Plaintiff in Error.

ERROR TO THE COUNTY

COURT OF WINNEBAGO

COUNTY, ILLINOIS.

Dove, P. J.,

Rosario A. Gaziano, an assistant state's attorney in and for Winnebago County, presented to the county judge of that county an information verified by him consisting of ten counts. The county judge certified that he had examined it, and from the same and evidence produced before him he was satisfied that there was reasonable cause for filing the same. The information was filed, and the defendant, Alex P. Peters, appeared, entered into bond, filed his motion to quash the information, which resulted in an order quashing counts 4, 5, 7, 8, 9, and 10. As to the four counts remaining, defendant entered a plea of not guilty, and the cause proceeded to trial. At the close of the People's case, the court directed a verdict for the defendant as to counts 1, 2, and 6, and the trial continued as to count 3, resulting in

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a verdict finding the defendant guilty as charged in that count and fixing his punishment at a fine of \$500.00 and confinement in the county jail for ninety days. After denying motions of the defendant for a new trial and in arrest of judgment and defendant's application to be admitted to probation, judgment was rendered on the verdict, and the record is before us for review by writ of error.

Counsel for plaintiff in error contends (1) that an assistant state's attorney does not have the power or authority to prosecute by information in his own name; (2) that count three does not allege a criminal offense; (3) that the court erred in the admission of evidence; (4) that the evidence does not establish defendant's guilt beyond a reasonable doubt; (5) that the court erred in giving certain instructions to the jury on behalf of the People and in refusing to give certain instructions tendered by the defendant; and (6) that the punishment fixed by the jury is excessive.

The third count of the information charges that the defendant on June 3, 1954, at and within the County of Winnebago, in the State of Illinois, and then and there residing in the State of Illinois and not then and there being regularly licensed to practice law in the courts of the State of Illinois, "did then and there unlawfully, knowingly and wilfully represent himself as authorized to practice law, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois." The provision of the Criminal Code upon which it is based provides: "That any person residing in this State not being regularly licensed to practice law



in the courts of this State, who shall in any manner hold himself out as an attorney at law or solicitor in chancery or represent himself either verbally or in writing, directly or indirectly, as authorized to practice law, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five (\$25.00) dollars, nor more than five hundred (\$500.00) dollars, or imprisonment in the county jail not exceeding one year, or by both fine and imprisonment, at the discretion of the court, for each and every offense, said misdemeanor to be prosecuted and costs assessed as in other cases of misdemeanor under chapter 36 of the Revised Statutes of Illinois.' (Ill. Rev. Stat. 1983, chap. 36, sec. 298.)

The information in this case was signed by Rosario A. Saviano, the assistant State's Attorney of Winnebago County. The defendant contends that the assistant State's Attorney had no authority to sign the information; but, instead, it should have been signed by the State's Attorney. In this state the statute does not require the state's attorney to sign an indictment and, in the absence of a statutory provision to this effect, it is not essential to the validity of an indictment that it be signed by the public prosecutor. (People v. Strauch, 287 Ill.220.)

In Hamer v. State, an Indiana case reported in 163 N.E. 91, it appeared that the defendant was tried and convicted of the crime of transporting intoxicating liquors in an automobile contrary to the statute. The statute also provided that when prosecuted by affidavit, it was the duty of the prosecuting attorney to approve the same by indorsement, using the words "approved by me" and sign the same as such prosecuting attorney.

the Federal Statutes of 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 25

[illegible]

In the Hamer case the affidavit was indorsed "approved by me this 19th day of September, 1925, C.C. Hamer, Deputy Prosecuting Attorney." In affirming the conviction, the Supreme Court of Indiana called attention to the <sup>further</sup> ~~XXXXX~~ statutory provision authorizing a prosecuting attorney to appoint deputies and a further provision to the effect that when a statute requires an act to be done which by law an agent or deputy as well may do as the principal, such requisition shall be satisfied by the performance of such act by an authorized agent or deputy. The court then said: "These statutes are in harmony with the universally accepted rules that an indictment is not invalid because it is signed by a duly appointed deputy or assistant prosecutor, 31 C.J. 620, and that an information may be filed by a deputy or assistant prosecutor, 31 C.J. 627.

Our statute provides that all offenses cognizable in county courts shall be prosecuted by information of the state's attorney, attorney general, or some other person and shall be verified by affidavit of some person that the same is true or that the same is true as he is informed and believes.

The statute also provides ~~XXX~~ that before an information is filed by any person other than the state's attorney or attorney general, the judge of the court shall examine the information and may examine the person presenting the same and require other evidence and satisfy himself that there is probable cause for filing the same and so indorse the same. (Ill. Rev. Stat., chap. 37, sec. 269.) Section 16, chap. 53, Ill. Rev. Stat., provides that where assistant state's attorneys are required in any county, the number of such assistants and the salaries to be paid such assistants shall be determined by the board of supervisors, and the salaries of such assistants shall be paid out of the county treasury, such assistant state's attorneys to be named by the state's attorney of the

In the House case the affidavit was introduced by me  
this 19th day of September, 1907, at New York, New York.  
Witness my hand and seal this 19th day of September, 1907.

XXXXXXXXXXXX

Further

I hereby certify that the foregoing is a true and correct copy of the original as filed in the office of the District Attorney, New York City.

Dated at New York, New York, this 19th day of September, 1907.

Assistant District Attorney, New York City.

The statute also provides

1. The State's interest in the health and safety of its citizens is a compelling interest. The State has a duty to protect its citizens from harm, and the health and safety of its citizens is a fundamental right. The State has a duty to protect its citizens from harm, and the health and safety of its citizens is a fundamental right. The State has a duty to protect its citizens from harm, and the health and safety of its citizens is a fundamental right.

county and, when so appointed, shall take the oath of office in like manner as state's attorneys and shall be under the supervision of the state's attorney. There is no merit in the contention of plaintiff in error that this information is void because not signed by the state's attorney. The statute was complied with, and counsel furnishes us with no authority to sustain his contention.

The defendant's next contention is that this court, the third in the information, does not allege facts sufficient to constitute a criminal offense. He concedes that the charge against him is in the language of the statute, but he maintains that even though it is in the language of the statute it is not sufficiently specific and definite because the statute does not define what constitutes the crime of practicing law without a license. This identical contention was passed upon by the Supreme Court in the People v. Schreiber, 250 Ill. 345, where the court said: (p. 349) "It is next contended that the court erred in overruling the motion to quash. The information charges, in each Count, the offense substantially in the language of the statute. It does not charge a common law offense, and where the offense is statutory it is sufficient to allege it in the words of the statute, provided it sufficiently defines the crime. (Strohm v. People, 160 Ill. 522; Meadowcroft v. People, 163 Ill. 56; McGracken v. People, 203 Ill. 215.) The information was, therefore, sufficient." Our courts have held and the defendant concedes that what constitutes the practice of law has never been, and probably cannot be, reduced to one specific all-inclusive definition. (People ex rel. Illinois State Bar Association, et al. v. Frank Schafer, 40 Ill. 45, 50.)



It would, therefore, be impossible to draft a statute which would define the offense of the unlawful practice of law. The information was in the language of the statute. It apprised the defendant of the offense he was charged with and was as definite and specific as it was possible to make it.

The evidence which the court admitted, of which defendant complains, was the testimony of several lawyers residing in Rockford who testified that plaintiff in error was not licensed to practice law in Illinois. ~~There is no merit in this contention.~~ The record shows that Alex J. Victor was called as a witness on behalf of the People and he testified that he was a lawyer and he was admitted to practice law in Illinois in 1937; that he was acquainted with defendant and had known him for fifteen years and that he had represented defendant as his attorney in the fall of 1948. He was then asked this question: "Of your own knowledge, Mr. Victor, do you know whether or not Alex F. Peters is licensed to practice law in the State of Illinois?" to which question no objection was made and the witness answered: "He is not." It is true the record does show that when substantially the same question was asked other lawyers called to testify on behalf of the People, counsel for defendant objected on the ground that the question called for a conclusion and that it was not the best evidence. We think the objection should have been sustained, but it was harmless error. Under the authorities in cases of this character, it was not incumbent upon the People to prove that defendant had no license to practice law. In *The People v. Handzik*, 410 Ill. 295, the plaintiff in error was convicted of violating the Medical



Practice Act and it was contended that the court erred in instructing the jury that the People were not required to prove the allegations of the information that the defendant did not have a license under that Act. In this connection the court said: <sup>(p. 305)</sup> "Failure to have a license is an essential part of the description of the offense and, if that was not alleged, the information would be vulnerable to a motion to quash and would not support a conviction. (People v. Prystalski, 358 Ill. 198.) As a general rule, it is elementary that the State is required to prove every essential element of the charge against the defendant. There usually is no burden upon a defendant to disprove any element or even to make a defense. However, there is an exception to this rule in this type of case. In prosecutions for doing an act which the State prohibits to be done by any person except those who are duly licensed, the negative averment that defendant had no license, being an averment peculiarly within the knowledge of the defendant, is taken as true, unless disproved by the defendant. (Rottler v. People, 321 Ill. 571; Moscher v. People, 91 Ill. 428; Williams v. People, 191 Ill. 64; People v. Frankowsky, 371 Ill. 493; People v. Hollenbeck, 328 Ill. 443.) Under the law as established by these cases the State was not required to prove that defendant had no license and the instruction was not prejudicial error. Furthermore, we are unable to see any unfairness or harm in applying this rule here where defendant took the stand and testified."



Objections, when made, to the testimony of the witnesses who testified defendant was not licensed to practice law, should have been sustained on the ground such testimony was not the best evidence. The court should also have sustained the objection to People's Exhibit No. 10, being the certificate of the Clerk of the Supreme Court that a search of the official roll of attorneys of the State of Illinois did not reveal the presence thereon of any person bearing the name of the defendant. These errors, however, were not prejudicial because the State was not required to prove the averment of the information that defendant did not have a license as that was a fact peculiarly within the knowledge of the defendant and is taken as true unless disproved by defendant and in the instant case, defendant testified he was not so licensed.

It is next contended that the evidence does not show beyond a reasonable doubt that the defendant was guilty of representing himself as authorized to practice law. An examination of the record discloses that the defendant is a resident of the State of Illinois and holds a certificate of registration as a real estate broker issued by the State of Illinois and that he was engaged in the real estate business in Rockford and had been so engaged since 1925. His office was in his home, and his wife was his secretary. On March 26, 1954, he was solicited by one Ferdinand Kutzke to sell Kutzke's property located in Rockford. Defendant inspected the property and Kutzke gave him the exclusive right for ninety days to sell the same. Defendant then advertised the property for sale in the newspaper. The property was occupied by Louis Legel



and his wife and they refused to let him show the property any more after he had shown it once or twice. He advised Kutzke of their attitude and told Kutzke the thing to do would be to get possession of the property by dispossessing the Legels. Kutzke asked him how to go about this, and the defendant told him a five-day notice to vacate should be given to the Legels since they were delinquent in their rent. According to Kutzke's testimony, the defendant told him, "I am a lawyer and can handle the whole works for you." Kutzke told him to go ahead and get possession. Defendant then had his wife ~~to~~ type ~~on~~ the five-day notice to be served on the Legels. He took this to Kutzke for his signature and at that time told him if the tenants were not out in five days that he would take care of the eviction of the tenants.

Defendant served the notice to vacate on the Legels and at the expiration of five days commenced a forcible entry and detainer suit against the Legels in the Justice of the Peace Court of Jack E. Cook. He paid \$7.50 in court costs in the Justice of the Peace Court for the institution of the suit. He had summons issued from the Justice's Court and this was served on the Legels. On April 13, which was three days after the suit had been commenced in the Justice's Court, he requested Kutzke to pay him the sum of \$25.40, which he said was for the court costs he had advanced in the Justice's Court and for his services. On April 15, the return day in the suit brought against the Legels, defendant appeared in the office of the Justice of the Peace and had judgment entered against the Legels for \$115.00, which was the amount of the rent in default and costs of \$7.90. The



Legels moved out of the Kutzke property on April 18th or 19th, and, when they did so, they turned the key over to the defendant. Mr. Legel testified that in his conversation with the defendant, the defendant told him he was representing Kutzke and that if he didn't move defendant would set him out in the street. Mrs. Legel also testified that the defendant told her that if they didn't get out in five days he would put them out. Kutzke also testified that he called defendant about the judgment against the Legels and asked him where the judgment was, and the defendant told him the only way to get the money from Legel was to garnishee him. In the meantime, defendant had contacted Reverend Arthur C. Blackwell and Essie Blackwell relative to purchasing the Kutzke property, and he had obtained from them a written agreement, which he prepared, to purchase the Kutzke property by paying \$500.00 down and the balance of \$6000.00 in installments of \$65.00 per month. The original agreement under which defendant was to sell the property was that it was to be sold for \$6500.00 in cash. Defendant prevailed upon Kutzke to sign the agreement whereby he was to sell the property to the Blackwells for \$500.00 down and the balance of \$6000.00 in monthly installments. Although Kutzke signed this agreement, he was not satisfied with it and went to see an attorney, John Hallock. Kutzke talked the matter over with him and asked Attorney Hallock what he should do about it. Mr. Hallock told him that he was "stuck" with the deal. At first, Kutzke refused to go ahead with the sale to the Blackwells, but after some compromises the transaction was ultimately completed.



On June 21, 1954, the defendant filed a transcript of the judgment secured in the Justice of the Peace Court with the Circuit Clerk of Winnebago County. The defendant denied he ever told Kutzke he was a lawyer or that he was authorized to practice law. Regardless of whether the defendant told Kutzke he was a lawyer, the undisputed evidence clearly shows that the defendant prepared the landlord's five-day notice which he served upon the Legels, that he instituted and prosecuted the forcible entry and detainer suit in the Justice of the Peace Court against the Legels to get possession of the Kutzke property, *and collected fees therefor,* that he prepared and negotiated the agreement between Kutzke and the Blackwells, and that he filed a transcript of the judgment obtained in the Justice of the Peace Court in the office of the Clerk of the Circuit Court of Winnebago County. All of these (The People v. Goodman, 366 Ill. 350, and cases there cited.) acts constituted the practice of law./ Since there was some conflict in the evidence, this made this proceeding peculiarly one for a jury to decide. They saw and heard the witnesses, and their verdict was approved by the trial court. There is abundant credible testimony to sustain the verdict of the jury and the judgment of the court, and, under such conditions, it would not be proper for us to disturb it. (People v. Switalski, 394 Ill. 530; People v. Kubish, 357 Ill. 531; People v. Hubbard, 313 Ill. 346.)

Argument is also made by the defendant that the court erred in admitting in evidence in rebuttal the record of a former conviction of the defendant of the crime of statutory rape. Section 734 of chapter 38 of the Statutes of Illinois (Ill. Rev.



Stat. Stat. 1953, chap. 38, sec. 734) provides: "No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise or by reason of his having been convicted of any crime; but such interest or convictions may be shown for the purpose of affecting his credibility." The record of defendant's conviction was properly identified by the deputy circuit clerk of the court wherein the conviction was had, and it was definitely shown that the defendant in that case is the same person as the defendant here. It was clearly admissible for the purpose of affecting defendant's credibility, and an instruction was given which limited it to that point only. (People v. Novak, 343 Ill. 355.)

Complaint is also made that the court erred in giving to the jury improper instructions tendered by the state and in refusing certain instructions offered by the defendant. We have examined all of the instructions complained of, and while one or two of them leave something to be desired, yet when they are considered as a series, as they must be, in view of the character of the evidence introduced, they were not prejudicial to the defendant. (People v. Marsh, 403 Ill. 81; People v. Janisa, 360 Ill. 155; People v. DeMarios, 401 Ill. 146, 153.) As to the instructions tendered by the defendant and refused by the court, the matters contained in them were all covered by other instructions and it was, therefore, unnecessary for the court to give such instructions.

Lastly, it is asserted that the punishment fixed by the jury is excessive. It is sufficient to observe that the sentence was within the statutory limits prescribed by the



legislature for the crime charged against the defendant, and, under such circumstances, it cannot be contended that the sentence was excessive. (People v. Dudgeon, 341 Ill. App. 533; State v. Mayhue, 238 Ill. App. 186.)

We have carefully reviewed the record in this case, and we do not find in it any error which warrants the reversal of the judgment. That judgment will, therefore, be affirmed.

Judgment affirmed.

*Crow J. Concurs.*  
*Evadi J. Concurs.*

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